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CERTIFICATE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 411

THE UNITED STATES OF AMERICA

vs.

JUDGE EUGENE RICE, DISTRICT JUDGE FOR THE EASTERN DISTRICT OF OKLAHOMA

ON CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT.

FILED SEPTEMBER 1, 1945

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665861—45

1 In United States Circuit Court of Appeals, Tenth Circuit

3152

UNITED STATES OF AMERICA, PETITIONER

v.

JUDGE EUGENE RICE, DISTRICT JUDGE FOR THE EASTERN DISTRICT OF OKLAHOMA, RESPONDENT

On Application for Leave to File Petition for Writ of Mandamus

Certificate of question of law

In the above-entitled cause a certain question of law has arisen on the record upon which this court desires the instructions of the Supreme Court of the United States for the proper decision of such cause.

Statement

Peter Micco died intestate, May 26, 1942. On that day Howard Cummings filed his petition in the County Court of Okfuskee County, Oklahoma, praying that L. F. Merrell be appointed administrator of the estate of Micco, deceased. On June 4, 1942,
2 the County Court of Okfuskee County, Oklahoma, entered its order appointing L. F. Merrell, E. F. O'Neal, and Perry Chisholm co-administrators of the estate of Micco, deceased.

On June 4, 1942, M. S. Robertson, United States Probate Attorney, pursuant to the provisions of the Act of Congress of April 12, 1926 (44 Stat. 239), caused written notice of the pendency of such probate proceeding to be served upon the Superintendent of the Five Civilized Tribes.

On June 19, 1942, the United States filed its petition for an order of removal under the Act of April 12, 1926. In its petition, the United States alleged that the proceeding was instituted to obtain the appointment of an administrator for the estate of Micco, deceased, a three-fourths blood Seminole Indian; that a portion of such estate, comprising real and personal property, is restricted under the laws of the United States; that the title to
3 and an interest in restricted land, and the proceeds, rents, income, and profits derived therefrom are involved; that the heirs-at-law of Micco, deceased, are restricted Indians and wards of the United States; and that notice of the pendency of the probate proceeding was served upon the Superintendent of the Five Civilized Tribes, together with a certified copy of all

pleadings on file in such cause, on June 4, 1942. An order of removal was issued on July 2, 1942. A transcript of the proceedings was filed in the United States District Court for the Eastern District of Oklahoma, on July 27, 1942.

On July 17, 1944, the United States filed its complaint in intervention in which it alleged that Micco, deceased, was duly enrolled as a three-fourths blood Seminole Indian opposite Roll No. 1600 of the approved Seminole Rolls, and, as such, was allotted land in the Seminole Nation, for which patents were duly executed delivered, and recorded; that Micco, deceased, was a full-blood Indian, being one-fourth Creek and three-fourths
4 Seminole; that the restricted land of Micco, deceased, produced large sums of money, which were held under the supervision of the Secretary of the Interior, pursuant to the regulations prescribed by him; and that Micco died intestate on May 26, 1942, possessed of such restricted lands and funds.

It further alleged:

"That at the time of the death of the said Peter Micco, he left surviving no wife, father, mother, children nor issue of deceased child; that he left surviving his sister, Haney Micco, who afterwards became Haney Larney; Andy Hulwa, also known as Andy High, who was the sole surviving child of Martha Micco, a pre-deceased sister of Peter Micco, deceased; Serena Spencer, Sallie Little afterwards Larney, Norman Ripley, Juanita Clark and Katie May Clark, all being the surviving children of Serena Micco, a pre-deceased sister of Peter Micco, deceased; that no other sister or brother survived Peter Micco, and no other child of a deceased sister or brother survived the said Peter Micco. That all of said persons specifically named in this paragraph as kin to the said Peter Micco, deceased, are restricted Indians of more than half-blood, and claiming to be Indians of the full-blood. That no court has legally determined the fact of heirship, and
5 that therefore interveners is entitled to the judgment and decree of this court determining who are, or were, the heirs of Peter Micco, deceased, and excluding all unknown persons claiming to be heirs of Peter Micco.

"That on or about November 25, 1942, the said Haney Micco Larney, died, leaving surviving her husband, Ryder Larney, and her minor children, June Larney, Hattie Larney, and Johnnie Lee Larnie, all unenrolled Seminole Indians; that the said Haney Micco Larney devised and bequeathed all of her estate in equal parts in said survivors by will, which was executed and approved in all particulars required by law, and has been admitted to probate by the county court having jurisdiction of the settlement of her estate, that subsequent to the death of the said Haney Micco Larney, the said Johnnie Lee Larney died intestate without ever having been married, leaving surviving, his father Ryder Larney,

and his two sisters, June Larney and Hattie Larney, hereinabove named; that no decree of heirship has ever been entered by any court to determine the heirs of the said Johnnie Lee Larney, deceased; that in order to determine who are now entitled to receive the estate of Peter Micco, it is necessary and proper that the judgment of this court shall determine whether or not the Will of the said Haney Micco Larney transferred her interest to
6 the said devisees and legatees hereinabove named, and, if not, to determine who are her heirs, and also who are the heirs of the said Johnnie Lee Larney, and for such purposes it is proper to proceed against all unknown persons claiming to be heirs of Johnnie Lee Larney, deceased."

It prayed that the court determine the heirs of Micco, deceased, the nature of the property of which Micco died seized, whether restricted or unrestricted, and the specific parts thereof which are restricted and subject to the supervision of the Secretary of the Interior.

On August 10, 1942, the three administrators filed their motion to remand the proceeding to the County Court of Okfuskee County, Oklahoma. On March 6, 1945, the United States District Court for the Eastern District of Oklahoma entered an order dismissing the petition in intervention without prejudice and ordering that the proceeding be remanded to the County Court of Okfuskee County, Oklahoma.

On April 28, 1945, the United States filed in this court its application for leave to file a petition for a writ of mandamus
7 and attached thereto a copy of its proposed petition. The petition prays that a writ of mandamus issue out of this court directed to the Judge of the United States District Court for the Eastern District of Oklahoma commanding him to vacate the judgment entered March 6, 1945, dismissing the complaint in intervention and ordering the proceeding remanded to the County Court of Okfuskee County, Oklahoma.

At the hearing on the application for leave to file the petition for the writ, because of the importance of the question presented, this court sat en banc.

The Judges of this court are equally divided on the question of whether the judgment of remand is reviewable by mandamus and on the question of whether the proceeding was removable under the provisions of the Act of April 12, 1926.

Question

8 (1) May this court, by mandamus, review the judgment of the United States District Court for the Eastern District of Oklahoma ordering the remand of the proceeding to the County Court of Okfuskee County, Oklahoma?

Since the judges of this court are equally divided on the two questions presented, we respectfully request the Supreme Court to require the entire record in the cause to be sent up for its consideration and that it decide the whole matter in controversy.

ORIE L. PHILLIPS,
SAM G. BRATTON,
WALTER A. HUXMAN,
ALFRED P. MURRAH,
Judges of the United States Circuit Court of Appeals sitting in said cause.

9 In the United States Circuit Court of Appeals for the Tenth Judicial Circuit

I, Robert B. Cartwright, Clerk of the United States Circuit Court of Appeals for the Tenth Judicial Circuit, do hereby certify that the foregoing is the original signed certificate of questions of law filed and entered of record in said cause on the 4th day of September, 1945, in case No. 3152, United States of America, petitioner, versus Honorable Eugene Rice, Judge of the United States District Court for the Eastern District of Oklahoma, respondent.

In Testimony Whereof, I hereunto subscribe my name and affix the seal of the United States Circuit Court of Appeals for the Tenth Circuit at my office in the city of Denver, Colorado, on the 4th day of September, A. D. 1945.

[SEAL] ROBERT B. CARTWRIGHT,
Clerk, United States Circuit Court of Appeals for the Tenth Circuit.

[Endorsement on cover:] Certificate. File No. 50114. U. S. Circuit Court of Appeals, Tenth Circuit. Term No. 411. The United States of America vs. Judge Eugene Rice, District Judge for the Eastern District of Oklahoma. Filed September 7, 1945. Term No. 411 O. T. 1945.

U. S. GOVERNMENT PRINTING OFFICE: 1945

In the Supreme Court of the United States

OCTOBER TERM, 1945

No. 411

THE UNITED STATES OF AMERICA

v.

JUDGE EUGENE RICE, DISTRICT JUDGE FOR THE EASTERN DISTRICT OF OKLAHOMA

ON CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

MOTION FOR ORDER DIRECTING THAT THE ENTIRE RECORD AND CAUSE BE SENT UP

The United States of America, by the Solicitor General, pursuant to Rule 37, par. 2, moves that the Court order the entire record in this cause to be sent up so that the Court may consider and decide the whole matter in controversy as upon appeal. In support of this motion the United States shows:

1. This proceeding came before the United States Circuit Court of Appeals for the Tenth Circuit on an application by the United States for leave to file a petition for a writ of mandamus directing the Honorable Eugene Rice, Judge of

the United States District Court for the Eastern District of Oklahoma, to vacate a judgment of dismissal and remand entered in the case entitled *In the Matter of the Estate of Peter Micco, deceased,* Civil No. 854, and to hear and determine that cause upon the merits.

2. The *Peter Micco* case is a proceeding to determine the heirs of an enrolled, restricted Indian member of the Five Civilized Tribes who died intestate seized of both restricted and unrestricted property having a value of more than $400,000 and who was survived by restricted Five Tribes Indians claiming to be his heirs. *Merrell* v. *United States,* 140 F. 2d 602 (C. C. A. 10). The case was originally instituted in the County Court of Okfuskee County, Oklahoma. After service of notice of the pendency of the action upon the Superintendent for the Five Civilized Tribes, the United States caused the case to be removed to the United States District Court for the Eastern District of Oklahoma in accordance with the provisions of section 3 of the Act of April 12, 1926, c. 115, 44 Stat. 239.

3. After the case was removed the United States filed a complaint in intervention in its own behalf and on behalf of its restricted Indian wards, heirs apparent of Peter Micco, praying that the court determine the heirs and determine that part of the decedent's property which was restricted. On motion of the administrators the district court on

March 6, 1945, entered an order dismissing the complaint in intervention without prejudice and remanding the proceeding to the County Court of Okfuskee County.

4. On March 10, 1945, the United States filed a notice of appeal from the judgment entered March 6, 1945.

5. On the day the appeal was taken the United States moved in the district court to stay the remand pending determination of the appeal. On March 15, 1945, the district court entered its order overruling the motion to stay the remand but allowing the Government an opportunity to seek relief from the circuit court of appeals. On March 20, 1945, the circuit court of appeals on motion of the United States directed that the judgment of remand be stayed pending further order of that court.

6. On April 28, 1945, the United States filed in the circuit court of appeals an application for leave to file a petition for a writ of mandamus directing the Honorable Eugene Rice, Judge of the United States District Court for the Eastern District of Oklahoma, to vacate the judgment entered March 6, 1945, in the *Peter Micco* case. On May 17, 1945, the respondent answered seeking dismissal of the Government's application on the ground that the order of remand was not reviewable by appeal or by mandamus.

7. The application was heard by the circuit court of appeals *en banc*, four judges sitting. Two questions were presented:

> 1. Whether the circuit court of appeals may by mandamus review the judgment of the United States district court ordering the remand of the *Peter Micco* case to the County Court of Okfuskee County, Oklahoma;
>
> 2. Whether the *Peter Micco* case was within the ambit of section 3 of the act of April 12, 1926, c. 115, 44 Stat. 239, so that upon removal pursuant to that section the federal district court had jurisdiction to determine who are the heirs of the intestate and what part of his property is restricted.

8. On September 7, 1945, the circuit court of appeals filed its certificate in this Court. In its certificate the circuit court of appeals stated (pp. 3–4):

> The Judges of this court are equally divided on the question of whether the judgment of remand is reviewable by mandamus and on the question of whether the proceeding was removable under the provisions of the Act of April 12, 1926.
>
> * * * * *
>
> Since the judges of this court are equally divided on the two questions presented, we respectfully request the Supreme Court to require the entire record in the cause to be sent up for its consideration and that it decide the whole matter in controversy.

9. While the circuit court of appeals thus specified the two questions in controversy, explained that the judges were equally divided on the two questions, and requested that this Court decide the whole matter, the court certified only one question, namely, the question of reviewability on mandamus.

10. If this Court should answer in the affirmative the single question presented by the certificate, the authority of the circuit court of appeals to review would be sustained. However, the Government would in fact be denied review since the circuit court of appeals already has announced that it is equally divided on the merits of the case, that is, the question respecting the removability of the *Peter Micco* proceeding.

11. Both the question of reviewability and the question of removability are of great importance in the administration of the affairs of the Indians of the Five Civilized Tribes. They are important too because of the effect of the district court decision on land titles in Oklahoma.

The question of reviewability. Section 3 of the Act of April 12, 1926, c. 115, 44 Stat. 239, provides that by serving the Superintendent for the Five Civilized Tribes with a written notice of pendency the interests of the United States can be concluded in cases affecting the land of Indians of the Five Civilized Tribes or the profits, issues, rents and proceeds derived therefrom.

United States v. *Hellard*, 322 U. S. 363, 364. Where notice is served, the United States is given the right to remove the cause to the federal court and is given an opportunity to participate in the case. The prime purpose of section 3 was to settle Oklahoma land titles. Prior to its enactment the United States could not be bound to a proceeding affecting restricted property of Indians of the Five Civilized Tribes. If dissatisfied with the outcome of a proceeding, the United States was free to institute an independent suit and to obtain a fresh decree. *Sunderland* v. *United States*, 266 U. S. 226, 232. So long as the Government could not be sued, litigants could never be certain whether the title to Indian land was merchantable. To cure that situation section 3 was enacted. H. Rep. 322, 69th Cong., 1st sess.; S. Rep. 317, 69th Cong., 1st sess. *Caesar* v. *Burgess*, 103 F. 2d 503, 506 (C. C. A. 10). *House* v. *United States*, 144 F. 2d 555, 559 (C. C. A. 10), certiorari denied, 323 U. S. 781.

In remanding the *Peter Micco* case, the district court held it was without jurisdiction on the ground that an heirship proceeding is not a "suit" within the meaning of section 3. This means that the notice served on the Superintendent was a nullity. It follows that the effect of the decision is to deny the United States the right to participate in the very proceeding in which the identities of the heirs are determined and the property is

ordered distributed. At the same time the decision denies private litigants the right to bind the United States and thus leaves open the way for the institution of a subsequent lawsuit by the United States on the same cause. This is exactly the mischief which section 3 of the Act of 1926 was intended to obviate.

The importance of the question of reviewability becomes apparent when it is considered that the effect of the *Peter Micco* decision is to exclude a large class of cases (an average of 200 per year) from the provisions of section 3 and to bar the United States from obtaining review of orders of remand in other classes of cases arising under section 3.[1] The Government represents the public interest in cases arising under the 1926 Act. Cf. *Heckman* v. *United States*, 224 U. S. 413, 437–438. In the *Peter Micco* case, that interest is expressed in the Government's duty to its restricted Indian wards who are the apparent heirs of the decedent, to participate in the case in order to aid the court in reaching a correct judgment and in order to

[1] Since the enactment of section 3 the Superintendent for the Five Civilized Tribes has been served with about 6,230 notices. Beginning with 1937 notices have been served in an average of over 600 cases each year. Of these an average of about one-third are heirship proceedings such as the *Peter Micco* case. The number of notices served has increased in almost unbroken progression since 1937. 1926–36, inc.—750 notices served; 1937—345; 1938—371; 1939—505; 1940—597; 1941—616; 1942—770; 1943—746; 1944—749; 1945—781 up to November 15, 1945.

insure that the Government's wards receive their share of the inheritance of the restricted property of the decedent and to protect those funds and properties which by law remain restricted when inherited by restricted Indians. In the absence of clear direction by Congress, considerations of public policy require that the Government should not be deprived of review of an order which would conclude such governmental rights. Cf. *United States* v. *American Bell Telephone Co.*, 159 U. S. 548, 554.

The 1926 Act is silent as to review of orders remanding cases removed under that section. In the absence of statutory prohibition orders of remand are reviewable by mandamus. Cf. *Railroad Company* v. *Wiswall*, 23 Wall. 507. The express statutory interdiction against review contained in the general removal act (Judicial Code, sec. 28; 28 U. S. C. sec. 71) does not extend to section 3 of the 1926 Act. The general removal act was not directed at the United States. It was aimed only at private defendants in state courts in support of the general purpose of the statute to contract the jurisdiction of the federal district courts. *In re Pennsylvania Co.*, 137 U. S. 451, 454. Section 3 confers the right of removal exclusively on the United States. Furthermore, it is an independent enactment, confined to Oklahoma, designed for a special purpose relating to the Government's interests in Five Tribes lands and correspondingly limited as to

parties and subject matter. An order remanding a case removed under the general removal act simply returns private litigants to the state court with their respective rights intact. An order such as the one remanding the *Peter Micco* case does more than return the case to the state tribunal. It concludes the rights of the United States to participate in that case since the order is a determination that the cause does not fall within the 1926 Act. Under these circumstances there seems to be no warrant for importing into section 3 the prohibition against review enacted 39 years earlier as a part of the general removal act to remedy a mischief which does not exist under the 1926 Act.

The question of removability. This question similarly is of great importance. Practically all of the lands of Indians of the Five Civilized Tribes lie within the area comprising the Eastern District of Oklahoma and the Northern District of Oklahoma. Since the enactment of the 1926 Act hundreds of notices have been served in proceedings to determine heirs. The United States has caused the removal of a number of those cases, usually involving a large estate where a contest is anticipated. In some cases the jurisdiction of the federal court has been challenged but in all cases, excepting *Peter Micco*, both federal district courts have sustained their jurisdiction. The circuit court of appeals has expressly held proceedings to

probate a will to be within section 3. *Caesar* v. *Burgess*, 103 F. 2d 503 (C. C. A. 10). By implication at least the circuit court of appeals has recognized heirship proceedings to be removable under section 3. *Walker* v. *Spencer*, 123 F. 2d 347, 349 (C. C. A. 10), certiorari denied, 316 U. S. 692. *Scott* v. *Beams*, 122 F. 2d 777 (C. C. A. 10), certiorari denied, 315 U. S. 809. *United States* v. *Anglin and Stevenson*, 145 F. 2d 622 (C. C. A. 10), certiorari denied, 324 U. S. 844. So far as the Government is aware the judgment in the *Peter Micco* case is the sole decision holding the federal court to be without jurisdiction of heirship proceedings removed under section 3.

In reliance on the law established prior to the *Peter Micco* decision, title rights have vested in hundreds of heirship cases and large amounts of money have been distributed. For example, see *Scott* v. *Beams*, 122 F. 2d 777 (C. C. A. 10), certiorari denied, 315 U. S. 809; *United States* v. *Anglin and Stevenson*, 145 F. 2d 622 (C. C. A. 10), certiorari denied, 324 U. S. 844. The stringent construction of section 3 adopted by the district court in the *Peter Micco* case is a departure from settled law. If the decision of the district court stands, the notices served in hundreds of cases would be ineffective to bind the United States and the decrees in those cases would be open to attack. Doubt would be cast on the validity of numerous titles, property rights would

be unsettled and a great deal of litigation probably would ensue. Further, the decision creates a conflict between the two federal district courts dealing with the property rights of deceased Indians of the Five Civilized Tribes since under the law in the Northern District of Oklahoma heirship proceedings are within the scope of section 3. If this Court does not pass upon the question of removability, the decision of the district court on that question will stand affirmed in view of the even division of the judges of the circuit court of appeals. A decision of such far-reaching consequences which interferes with the Government's protective duties to its Indian wards, jeopardizes property rights, and creates conflict with the only other district handling cases of the same nature, should not be left to stand unreviewed.

12. A certified copy of the record in the mandamus proceedings and a certified copy of the record in the *Petit Micco* case are on file in the Clerk's office.

J. HOWARD MCGRATH,
Solicitor General.

DECEMBER, 1945.

U. S. GOVERNMENT PRINTING OFFICE 1945

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No. 511

In the Supreme Court of the United States

OCTOBER TERM, 1945

THE UNITED STATES OF AMERICA

v.

JUDGE JOSEPH W. HUGHES, DISTRICT JUDGE FOR THE EASTERN DISTRICT OF OKLAHOMA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES

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In the Supreme Court of the United States

OCTOBER TERM, 1945

No. 411

THE UNITED STATES OF AMERICA

v.

JUDGE EUGENE RICE, DISTRICT JUDGE FOR THE EASTERN DISTRICT OF OKLAHOMA

ON CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The case is here on certificate and the circuit court of appeals wrote no opinion. The opinion of the United States District Court for the Eastern District of Oklahoma in the case entitled *In re Micco's Estate,* out of which this proceeding grew, is reported in 59 F. Supp. 434.

JURISDICTION

The certificate of the circuit court of appeals was filed September 7, 1945. On December 17, 1945, the United States filed a motion requesting that the Court order up the entire record and

decide the whole matter in controversy. On January 2, 1946, this Court ordered that "Further consideration of the motion to bring up the entire record and cause is postponed until the hearing of the case on the certificate at which time counsel may direct their argument to the question of the power of the Court to order up the entire record and cause pursuant to 28 U. S. C. 346." The jurisdiction of the Court is invoked under section 239 of the Judicial Code, as amended, 28 U. S. C. 346.

QUESTIONS PRESENTED

1. Whether, after certification of a question in a proceeding originating in the circuit court of appeals by the filing of an application for leave to file a petition for a writ of mandamus directing a judge of the United States district court to hear and determine a case, this Court has the power to order up the entire record and dispose of the whole cause.

2. [THE CERTIFIED QUESTION] May the circuit court of appeals, by mandamus, review the judgment of the United States District Court for the Eastern District of Oklahoma ordering the remand of a proceeding removed from the County Court of Okfuskee County, Oklahoma, to the federal district court pursuant to section 3 of the Act of April 12, 1926, c. 115, 44 Stat. 239?

3. Whether a proceeding instituted in a county court of Oklahoma for letters of administration

and to determine the heirs of an enrolled restricted member of the Five Civilized Tribes who died intestate seized of both restricted and unrestricted property and who was survived by restricted Five Tribes Indians claiming to be his heirs is removable to the United States district court under section 3 of the Act of April 12, 1926, c. 115, 44 Stat. 239.

STATUTES INVOLVED

The pertinent statutes are set forth in the Appendix, *infra*, pp. 46–65.

STATEMENT

This proceeding came before the circuit court of appeals on an application by the United States for leave to file a petition for a writ of mandamus directing the Honorable Eugene Rice, Judge of the United States District Court for the Eastern District of Oklahoma, to vacate a judgment of dismissal and remand entered in the case entitled *In the Matter of the Estate of Peter Micco, deceased*, Civil No. 854, in the District Court of the United States for the Eastern District of Oklahoma, and to hear and determine that cause upon the merits.

The *Peter Micco* case is a proceeding to determine the heirs of an enrolled, restricted Indian member of the Five Civilized Tribes who died May 26, 1942, intestate, seized of both restricted and unrestricted property having a value of more than

$400,000, and who was survived by restricted Five Tribes Indians claiming to be his heirs. Certificate, pp. 1–3; see also *In re Micco's Estate*, 59 F. Supp. 434 (E. D. Okla.); *Merrell* v. *United States*, 140 F. 2d 602 (C. C. A. 10).[1] On the same day the Indian died, a petition for letters of administration was filed in the County Court of Okfuskee County, Oklahoma. Shortly afterwards, the United States Probate Attorney on behalf of the guardian of the next-of-kin wards moved to dismiss on the ground that the county court was without jurisdiction and on the ground that the petitioner had no legal right to be appointed administrator. The county court did not rule on the motion but granted letters of administration on June 4, 1942. On that date written notice of the pendency of the proceeding was served on the Superintendent for the Five Civilized Tribes and the United States seasonably caused the case to be removed to the United States District Court for the Eastern District of Oklahoma pursuant to the provisions of section 3 of the Act of April 12, 1926, c. 115, 44 Stat. 239 (Certificate, p. 1).

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[1] In the *Merrell* case the circuit court of appeals held that the United States District Court for the Northern District of Oklahoma was without jurisdiction of a proceeding to administer the estate of *Peter Micco*, on the ground that the County Court of Tulsa County from which the proceeding had been removed had no jurisdiction since jurisdiction over the same estate first had been exercised by the County Court of Okfuskee County in the eastern district of Oklahoma.

After the case was removed the United States filed a complaint in intervention in its own behalf and in behalf of its restricted Indian wards, heirs apparent of Peter Micco, praying that the court determine the heirs and determine that part of the decedent's property which was restricted. On motion of the administrators the district court on March 6, 1945, entered an order dismissing the complaint in intervention without prejudice and remanding the proceeding to the County Court of Okfuskee County (Certificate, pp. 1–3).

On March 10, 1945, the United States filed notice of appeal from the judgment of dismissal and remand entered March 6, 1945, and sought to have the district court stay its order of remand. The district court refused to grant that relief but on motion of the Government the circuit court of appeals directed that the judgment of remand be stayed pending further order of that court.

On April 28, 1945, the United States filed in the circuit court of appeals an application for leave to file a petition for a writ of mandamus directing the Honorable Eugene Rice, Judge of the United States District Court for the Eastern District of Oklahoma, to vacate the judgment entered March 6, 1945, in the *Peter Micco* case (Certificate, p. 3). On May 17, 1945, the respondent answered seeking dismissal of the Government's application on the ground that the order of remand was not reviewable by appeal or by mandamus.

The application was heard by the circuit court of appeals *en banc*, four judges sitting. Two questions were presented (Certificate, p. 3):

> 1. Whether the circuit court of appeals may by mandamus review the judgment of the United States district court ordering the remand of the *Peter Micco* case to the County Court of Okfuskee County, Oklahoma;
>
> 2. Whether the *Peter Micco* case was within the ambit of section 3 of the Act of April 12, 1926, c. 115, 44 Stat. 239, so that upon removal pursuant to that section the federal district court had jurisdiction to determine who are the heirs of the intestate and what part of his property is restricted.

On September 7, 1945, the circuit court of appeals certified one questions to this Court, the question of reviewability by mandamus but in its certificate stated it was equally divided as to both questions (Certificate, p. 3) and requested this Court to order up the entire record and to decide the whole case (Certificate, p. 4). On December 17, 1945, the Government filed its motion in this Court seeking to have the entire record and cause brought up on the grounds (1) that the judges of the circuit court of appeals were equally divided on the two questions in controversy (2) that if the single question certified were answered by this Court in the affirmative the Government would in effect be denied review

on account of the equal division of the judges of the circuit court of appeals on the remaining question, that is, whether the *Peter Micco* proceeding is removable to the federal district court, and (3) that both questions are of great importance and that the decision of the district court would have a far-reaching effect on land titles in Oklahoma. On January 2, 1946, this Court entered its order postponing further consideration of the motion until the hearing on the certificate with permission to counsel to direct their argument to the question of the power of the Court to grant the relief sought by the motion.

SUMMARY OF ARGUMENT

I. The Court has the power to order up the entire record and decide the whole controversy pursuant to section 239 of the Judicial Code, as amended, 28 U. S. C. 346 (Appendix, pp. 48–49). The only possible objection is that for the Court to do so would be to exercise original jurisdiction not granted by Article III, sec. 2, cl. 2 of the Constitution. This objection is without merit. The appellate jurisdiction of the court below was invoked. *Roche* v. *Evaporated Milk Assn.*, 319 U. S. 21, 25; *McClellan* v. *Carland*, 217 U. S. 268, 280; cf. *United States* v. *Mayer*, 235 U. S. 55, 65–66. If the Government had applied to this Court for the writ, it would have been within the power of the Court to issue the writ in aid of its appellate jurisdiction. *Ex parte United States*, 287 U. S.

241, 245–249. It is this same appellate power which is invoked by the Government's motion.

II. The judgment of the district court remanding the *Peter Micco* case is reviewable. It may be reviewable on appeal. There are considerations which support the view that as to the United States the judgment of remand in the *Peter Micco* case is a "final decision." The judgment defeats the Government's right under section 3 of the 1926 Act to remove, intervene and participate in the *Peter Micco* case and is a final determination of the right of the United States to secure in that case the relief essential to the proper exercise of the governmental interest in the protection of its Indian wards. Cf. *Stevens* v. *Nave-M'Cord Mercantile Co.*, 150 Fed. 71, 73 (C. C. A. 8). If the judgment of remand is not reviewable on appeal it is reviewable by mandamus.

In the absence of statutory prohibition, mandamus will lie to compel a district court to proceed with a case it has ordered remanded to the state court. *Railroad Company* v. *Wiswall*, 23 Wall. 507. *In re Pennsylvania Co.*, 137 U. S. 451, 453. The Act of April 12, 1926, c. 115, 44 Stat. 239, (Appendix, pp. 49–51) contains no prohibition against review of orders remanding cases removed under section 3 of that act and there is no reason to import the prohibition against review contained in the Judiciary Act of March 3, 1887, c. 373, sec. 2, 24 Stat. 552, 553, which has been substantially embodied into section 28 of the Judicial Code, 28

U. S. C. 71, (Appendix, pp. 46–48). The general purpose of the 1887 Act was to reduce the volume of business in the federal courts by contracting the jurisdiction of those courts over private suitors—not the United States. The provision for the removal of cases to the federal courts was concerned with private defendants. The prohibition against review related to private litigants only and was not and could not have been directed at the United States. By contrast, section 3 of the 1926 Act provides that by serving the Superintendent for the Five Civilized Tribes with a written notice of pendency the interests of the United States can be concluded in cases affecting allotted land of Indians of the Five Civilized Tribes. *United States* v. *Hellard*, 322 U. S. 363. Where notice is served, the United States is given the exclusive right to remove the cause to the federal court. Where a case is remanded, only the Government can seek review. Section 3 has no relation by purpose or text to section 28 of the Judicial Code. The mischief the prohibition against review was intended to remedy does not exist under section 3 but on the contrary there is reason to permit review since the Government represents the public interest in cases arising under the 1926 Act. *Heckman* v. *United States*, 224 U. S. 413, 437–438. Cf. *United States* v. *American Bell Telephone Co.*, 159 U. S. 548, 554.

Even if the prohibition against review be regarded as extending to cases under section 3, it

does not apply to the United States since the Government is not to be deprived of a prerogative, right, benefit or remedy by the general terms of a statute which does not expressly include the United States. *United States* v. *Stevenson*, 215 U. S. 190, 197; *United States* v. *American Bell Telephone Co.*, 159 U. S. 548, 554; *United States* v. *Herron*, 20 Wall. 251, 263; *Dollar Savings Bank* v. *United States*, 19 Wall. 227, 239; *City of Springfield* v. *United States*, 99 F. 2d 860, 862 (C. C. A. 1), certiorari denied, 306 U. S. 650; *United States* v. *Greene*, 26 Fed. Cas. No. 15258 at 33, 34 (C. C. Me.). *See Board of Com'rs of Pawnee County* v. *United States*, 139 F. 2d 248, 250 (C. C. A. 10), certiorari denied, 321 U. S. 795.

III. The *Peter Micco* case is removable under section 3 of the 1926 Act. It satisfies the requisites of the statute (1) as to "suit"; cf. *Ex Parte Milligan*, 4 Wall. 2, 113; cf. *Tutun* v. *United States*, 270 U. S. 568, 577; (2) as to parties; *Merrell* v. *United States*, 140 F. 2d 602, 604 (C. C. A. 10); *In re Micco's Estate*, 59 F. Supp. 434, 435 (E. D. Okla.); *Walker* v. *Spencer*, 123 F. 2d 347, 349 (C. C. A. 10), certiorari denied, 316 U. S. 692; and (3) as to the nature of the claim. Indians claiming to be heirs of Peter Micco are claiming "title to or an interest" in the restricted property of the decedent. *White House Lumber Co.* v. *Howard*, 142 Okla. 163, 165 (1930); *Wells* v. *Helms*, 105 F. 2d 402 (C. C. A. 10); see *In re Thompson's Estate*, 179 Okla. 240,

243 (1937); *Homer* v. *Lester*, 95 Okla. 284, 289 (1923).

A contested proceeding for the probate of a will is removable under section 3. *Caesar* v. *Burgess*, 103 F. 2d 503, 507 (C. C. A. 10). A contest is present in the *Peter Micco* case but is not necessary. *Ex parte Milligan*, *supra*; *Tatun* v. *United States*, *supra*. There is no controlling distinction between a proceeding where the Indian died testate as in the *Burgess* case and one where the Indian died intestate as in the *Peter Micco* case. In one the will acts as an alienation; in the other, the property passes by force of the law of succession.

The district court's holding in the *Peter Micco* case (1) would defeat the purpose of section 3 to enable litigants claiming an interest in allotted lands to bind the United States by the results of litigation, *Caesar* v. *Burgess*, 103 F. 2d 503 (C. C. A. 10); *United States* v. *Exico*, 115 F. 2d 389, 392 (C. C. A. 10); *Walker* v. *Spencer*, 123 F. 2d 347, 349 (C. C. A. 10), certiorari denied, 316 U. S. 692; *House* v. *United States*, 144 F. 2d 555, 559 (C. C. A. 10), certiorari denied, 323 U. S. 781, (2) would permit relitigation of identical issues, the very mischief Congress sought to remedy by section 3; and (3) would practically negate section 3 by permitting the removal of partition suits only.

IV. The decision in the *Peter Micco* case is a departure from existing law in the Eastern Dis-

trict of Oklahoma and is in conflict with the law in the Northern District of Oklahoma, the only other district dealing with the property rights of deceased Indians of the Five Civilized Tribes. It is the sole decision rendered during the life of the statute holding that a federal court is without jurisdiction of a proceeding such as the *Peter Micco* case upon removal under section 3. In reliance on the established law, title rights have vested in hundreds of cases. If the *Peter Micco* decision stands, those rights would be subject to attack, doubt would be cast on the validity of numerous titles, and property rights would be unsettled.

ARGUMENT

I

THE COURT HAS POWER TO ORDER UP THE ENTIRE RECORD AND DECIDE THE WHOLE CONTROVERSY PURSUANT TO SECTION 239 OF THE JUDICIAL CODE, AS AMENDED, 28 U. S. C. 346.

This proceeding originated in the circuit court of appeals on application for leave to file a petition for a writ of mandamus in aid of the court's appellate jurisdiction over the *Peter Micco* case. Both that action and this are "cases." There is therefore clear statutory authority under section 239 for this Court to order up the entire record and decide the whole controversy. The only possible objection is that for this Court to do so would be to exercise original jurisdiction not granted to the Court by Article III, sec. 2, cl. 2

of the Constitution. Cf. *Wheeler Lumber Co.* v. *United States*, 281 U. S. 572, 576; cf. *B. & O. R. R.* v. *Interstate Comm. Comm.*, 215 U. S. 216. That the objection is without merit may be demonstrated in two ways.

First, the jurisdiction of the circuit court of appeals in this case is founded on the "all writs" statute. Section 262 of the Judicial Code, 28 U. S. C. 377. That section empowers the circuit court of appeals to issue a writ of mandamus in aid of its appellate jurisdiction over the *Peter Micco* case. *Roche* v. *Evaporated Milk Assn.*, 319 U. S. 21, 25; *McClellan* v. *Carland*, 217 U. S. 268, 280. Thus, even though the proceeding is in form an original one in the circuit court of appeals, it in fact invokes the appellate jurisdiction of that court. Since the case was an appellate one in the court below, it follows that a disposal of the same cause by this Court would simply be an exercise of appellate, not original, jurisdiction. Cf. *United States* v. *Mayer*, 235 U. S. 55, 65–66.

Second, if the Government had applied to this Court instead of to the circuit court of appeals for a writ of mandamus, it would have been within the power of this Court to issue the writ in aid of its ultimate power to review the *Peter Micco* case by certiorari to the circuit court of appeals. *Ex parte United States*, 287 U. S. 241, 245–249. This is true even though the circuit court of appeals would have been completely by-

passed. The Court simply would be exercising its appellate power. It is this same appellate power, not the Court's original jurisdiction, which is invoked by the Government's motion to bring up and dispose of the entire cause.

II

THE JUDGMENT OF THE DISTRICT COURT REMANDING THE PETER MICCO CASE TO THE STATE COURT IS REVIEWABLE

A. THE JUDGMENT OF REMAND MAY BE REVIEWABLE ON APPEAL

As a general rule mandamus will lie only when there is no other adequate remedy. *In re Pennsylvania Co.*, 137 U. S. 451, 453. It follows that if the judgment remanding the *Peter Micco* case is reviewable on appeal, mandamus will not lie. With respect to cases removed under the general removal act (section 28 of the Judicial Code, 28 U. S. C. 71, and its predecessor enactments) an order of a federal court remanding a cause to the state court cannot be reexamined on appeal because it is not a "final decision" within the meaning of the controlling statute, section 128, Judicial Code, 28 U. S. C. 225. *Railroad Company* v. *Wiswall*, 23 Wall. 507; *In re Pennsylvania Co.*, 137 U. S. 451, 453; *Gay* v. *Ruff*, 292 U. S. 25, 28, fn. 3; *Employers Corp.* v. *Bryant*, 299 U. S. 374, 378. Remands in such cases neither conclude nor dispose of any of the rights of the litigants. The parties and their causes simply are returned

to the state tribunals with their rights unaffected. The same thing may be true with respect to the private litigants in the *Peter Micco* case. The remand would simply relegate them to the state court for adjudication of their property rights. But a different situation prevails with respect to the effect on the United States of a judgment such as the one entered in the *Peter Micco* case, remanding a suit removed under section 3 of the 1926 Act. To preserve the public interest in the affairs of Five Tribes Indians (cf. *Heckman* v. *United States*, 224 U. S. 413, 437–438), Congress by section 3 has provided a means of concluding the interests of the United States in cases affecting property of Five Tribes Indians and has conferred on the United States the right to remove such suits to the federal court and to intervene and participate in these proceedings. These circumstances give rise to considerations which support the view that so far as the United States is concerned the district court's judgment of remand in the *Peter Micco* case is a "final decision." That judgment not only remands the proceedings but is an adjudication that the *Peter Micco* case is not within the scope of section 3. To that extent the judgment effectively bars the United States from representing in that lawsuit the public interest in the rights of the Government's Indian wards. Since the judgment of remand cuts off the Government's right to remove

and to intervene and participate in the case, it is a final determination of the right of the United States to secure in that case the relief essential to the proper exercise of the governmental interest. Cf. *Stevens* v. *Nave-M'Cord Mercantile Co.*, 150 Fed. 71, 73 (C. C. A. 8). If the judgment of remand in the *Peter Micco* case is appealable,[2] the certified question should be answered "No." The Government's rights are protected since an appeal from that judgment was perfected, the appeal was consolidated for argument with the mandamus proceeding and was submitted to the court below.

B. IF THE JUDGMENT OF REMAND IS NOT APPEALABLE, IT IS REVIEWABLE BY MANDAMUS

In the absence of a statutory prohibition mandamus will lie to compel a district court to proceed with a case it has incorrectly ordered remanded to the state court. *Railroad Company* v. *Wiswall*, 23 Wall. 507; *In re Pennsylvania Co.*, 137 U. S. 451, 453. Section 3 of the Act of 1926 contains no prohibition against review of orders of remand.[3] It is silent in that respect. It is true that review whether by appeal or mandamus of orders remanding cases removed under the

[2] The Government's contention that the prohibition against review contained in the general removal act does not bar review of orders remanding cases removed under section 3 is discussed in connection with the question of reviewability by mandamus at pp. 16–26, *infra*.

[3] For full text, see Appendix, pp. 49–51.

general removal act was forbidden by the Judiciary Act of March 3, 1887, c. 373, sec. 2, 24 Stat. 552, 553 which has been substantially embodied into section 28 of the Judicial Code, 28 U. S. C. sec. 71.[1] *In re Pennsylvania Co.*, 137 U. S. 451, 454; *Gay* v. *Ruff*, 292 U. S. 25, 29. But the prohibition against review contained in section 28 of the Judicial Code does not extend to orders remanding cases removed under section 3 of the 1926 Act for two reasons. First, the 1926 Act contains no prohibition against review of orders of remand and it supplies no reason for importing into its text the prohibition contained in the Judicial Code. Second, in any event, the prohibition against review does not apply to the United States.

1. *The 1926 Act contains no prohibition against review of orders of remand and supplies no reason for importing the prohibition from section 28 of the Judicial Code.*

As already pointed out, the 1926 Act contains no ban against review of orders of remand. In addition, a comparison of the objectives of Section 28 of the Judicial Code with the objectives of the 1926 Act and a comparison of the mischiefs the two acts were intended to remedy make it clear that no justification exists for extending the prohibition of section 28 to section 3 of the 1926

[1] For full text, see Appendix, pp. 46–48.

Act so as to prevent the review of orders remanding cases removed by the United States under section 3.

a. *The United States does not fall within the reason of section 28 of the Judicial Code*

Section 28 stems from the Act of 1887, which was a complete Judiciary Act. It restated the existing law defining the jurisdiction of the circuit (district) courts along with a number of new amendments. The general purpose of the 1887 Act so far as it altered then existing law was to reduce the volume of business in the federal courts by contracting the jurisdiction of those courts. This was accomplished primarily by raising the jurisdictional requirement of the sum or value in controversy from $500 to $2,000 both in cases originating in the federal courts and in cases removable from the state courts. Obviously this was aimed at private suitors since the jurisdiction of the courts over actions brought by the United

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The legislative history of the 1887 Act is not helpful. The prohibition against review was not contained in the bill as passed by the House. H. R. No. 2441, 49th Cong., 2d sess. (1887). It was inserted by the Senate Committee on the Judiciary, 18 Cong. Rec., pt. 3, pp. 2542–2543 (1887). There were no committee reports and this portion of the bill was not discussed during the debate. 18 Cong. Rec., pt. 3, pp. 2542–2546 (1887). This Court, however, has defined the purpose of the act as stated in the text. *In re Pennsylvania Co.*, 137 U. S. 451, 454; *Employers Corp. v. Bryant*, 299 U. S. 374, 379.

States has never depended upon the amount involved.

Section 1 of the Act defined the original jurisdiction of the circuit (district) courts. It did not diminish or in any way affect the jurisdiction which had theretofore existed in actions brought by the United States. Congress was not undertaking to contract the jurisdiction of the federal courts as to cases in which the United States was the plaintiff. The traditional right of the United States to sue in its own courts was left untouched.

Section 2 of the 1887 Act contained the prohibition against review. It dealt with the removal of cases and provided that suits "* * * may be removed by the defendant or defendants * * *." This removal statute was not available to the United States —— it could not have been. Only *defendants* could remove. The United States could not be a defendant in a state court since it had not consented to be sued. *Stanley* v. *Schwalby*, 162 U. S. 255, 270. Since only a defendant could be in a position to seek review of an order of remand, it follows that the prohibition against review of orders of remand was not aimed at the United States. The prohibition against review related to private litigants only. Under the 1887 Act the situation where the Government might seek such review simply could not arise. The Government did not and could not fall within the reason for the prohibition of review of orders remanding causes.

b. Section 3 of the 1926 Act is unrelated to and independent of Section 28 of the Judicial Code

Thirty-nine years after the 1887 Act Congress enacted the Act of April 12, 1926. Section 3 of that act provides that by serving the Superintendent for the Five Civilized Tribes with a written notice of pendency the interests of the United States can be concluded in cases affecting the land of Indians of the Five Civilized Tribes or the profits, issues, rents, and proceeds derived therefrom. *United States* v. *Hellard*, 322 U. S. 363, 364. Where notice is served, the United States is given the right to intervene in the state court or at its option to remove the cause to the federal court and there intervene. A prime purpose of section 3 was to settle Oklahoma land titles. Prior to its enactment the United States could not be bound to a proceeding affecting restricted property of Indians of the Five Civilized Tribes. If dissatisfied with the outcome of a proceeding, the United States was free to institute an independent suit and to obtain a fresh decree. *Sunderland* v. *United States*, 266 U. S. 226, 232. So long as the Government could not be sued, litigants could never be certain whether the title to Indian land was merchantable. To cure that situation section 3 was enacted. H. Rep. No. 322, 69th Cong., 1st sess. (1926); Sen. Rep. No. 317, 69th Cong., 1st sess. (1926); *Caesar* v. *Burgess*, 103 F. 2d 503, 506 (C. C. A. 10); *House* v. *United States*, 144

F. 2d 555, 559 (C. C. A. 10), certiorari denied, 323 U. S. 781.

In short, section 3 is an independent enactment confined to Oklahoma, designed for a special purpose relating to the Government's interests in Five Tribes lands and correspondingly limited as to parties and subject matter. Neither by purpose nor by text is it related to the 1887 Act as embodied in section 28 of the Judicial Code. On the contrary, contradistinguished from section 28, section 3 of the 1926 Act enlarged the jurisdiction of the federal courts in Oklahoma on removal to embrace a class of cases of which those courts otherwise would not have cognizance. In addition, whereas section 28 confers the right of removal on all "defendants," section 3 gave that right to the United States exclusively. In submitting the rights of the United States to binding adjudication, Congress in section 3 carefully preserved to the United States the right of litigating in its own courts. It gave the Government, and it alone, "the right," where notice was served, to remove a suit to the federal district court. It follows that where such a case is remanded, the Government alone can seek review. It seems fair to conclude that Congress intended that if the United States is to be bound by a cause instituted by another, then at least it should have a right to have that cause heard and determined by its own courts, and this includes rights and privileges of review.

The Government represents the public interest in cases arising under the 1926 Act. *Heckman* v. *United States*, 224 U. S. 413, 437–438. In such cases Congress should not be charged with an intent to limit the reviewing powers of the federal appellate courts. Cf. *United States* v. *American Bell Telephone Co.*, 159 U. S. 548, 554. This is particularly apparent when it is considered (1) that the 1926 Act contains no prohibition against review of orders of remand; (2) that to limit the powers of review the Court would be compelled to import into the 1926 Act from a statute enacted 39 years before a prohibition directed only at private litigants and not the United States, and (3) that the mischief the prohibition was intended to remedy does not exist under the 1926 Act but, on the contrary, reasons for granting the review to the sovereign do exist.

2. *The prohibition against review in Section 28 does not apply to the United States*

Even if section 3 be treated as legislation of a fragmentary nature to be harmonized with Section 28 of the Judicial Code,[8] the bar of review contained in Section 28 does not apply to the United

[8] In *United States* v. *Fixico*, 115 F. 2d 389, the court below so construed section 3 and held the prohibition against review extended to cases under section 3. It should be pointed out that in the *Fixico* case the Government did not advance and the court did not consider the proposition that the prohibition does not apply to the United States.

States since the Government is not to be deprived of a prerogative, right, benefit, or remedy by the general terms of a statute which does not expressly include the United States. *United States* v. *Stevenson,* 215 U. S. 190, 197; *United States* v. *American Bell Telephone Co.;* 159 U. S. 548, 554; *United States* v. *Herron,* 20 Wall. 251, 263; *Dollar Savings Bank* v. *United States,* 19 Wall. 227, 239; *City of Springfield* v. *United States,* 99 F. 2d 860, 862 (C. C. A. 1), certiorari denied, 306 U. S. 650; *United States* v. *Greene,* 26 Fed. Cas. No. 15258 at 33, 34 (C. C. Me.). See *Board of Com'rs of Pawnee County* v. *United States,* 139 F. 2d 248, 250 (C. C. A. 10), certiorari denied, 321 U. S. 795.

In the *American Bell Telephone* case, the statute (Act of March 3, 1891, c. 517, sec. 6, 26 Stat. 826, 828) provided that the judgments of the circuit courts of appeals shall be "final" "in all cases arising under the patent laws." From an adverse holding by a circuit court of appeals in an action to cancel a patent for an invention, the United States appealed to this Court. The Telephone Company moved to dismiss on the ground that the judgment of the circuit court of appeals was final and no appeal would lie. This Court examined the objectives of the Act of 1891 and explained that its purpose was to transfer a large part of the Supreme Court's appellate jurisdiction to the newly created circuit courts of appeals;

that as a means of relieving the Supreme Court of part of its burden, Congress cut off the right of appeal to the Supreme Court in actions brought by private litigants to vindicate rights under the patent laws by making the judgments of the circuit courts of appeals "final" "in all cases arising under the patent laws." But the Court declared there was nothing in that objective "which furnished foundation for the belief that Congress manifestly intended to place a limitation on the appellate jurisdiction" of the Court in a case where the United States was the appellant (p. 554). The Court cited the case of *Dollar Savings Bank* v. *United States*, 19 Wall. 227, and confirmed the principle there laid down that the rights of the sovereign are not diminished by a statute which does not expressly include the Government. It concluded (p. 555):

> We cannot impute to Congress the intention of narrowing the appellate jurisdiction of this court in a suit brought by the United States as a sovereign in respect of alleged miscarriage in the exercise of one of its functions as such; deeply concerning the public interests; and not falling within the reason of the limitations of the act.

The case of *City of Springfield* v. *United States*, 99 F. 2d 860 (C. C. A. 1), certiorari denied, 306 U. S. 650, presents another striking illustration of the principle. That was an action to enjoin the imposition of state taxes on federal property.

The City of Springfield asserted that the federal court was without jurisdiction by virtue of section 24 (1) of the Judicial Code (28 U. S. C. 41 (1)) providing that "no district court shall have jurisdiction of any suit" to prevent the assessment or collection of taxes imposed under state law where a plain, speedy, and efficient remedy may be had in the courts of the state. The circuit court of appeals concluded that a plain, speedy, and efficient remedy was not available under the state law but it did not stop there. In addition, as a separate ground of decision, it held (p. 862) "* * *, it does not appear that the amendment to Sec. 24 applied to the United States, since it is not specifically included therein. *Dollar Savings Bank v. United States*, 19 Wall. 227, 22 L. Ed. 80."

The application of the principle is well demonstrated in the old case of *United States v. Greene*, 26 Fed. Cas. No. 15258 (C. C. Me.) where the United States sued as assignee of a promissory note given by the defendants. The defendants pleaded that they and the payee were citizens of the same state and therefore the court was without jurisdiction since the Judiciary Act provided "nor shall any district or circuit court have cognizance of any suit to recover the contents of any promissory note, * * * in favor of an assignee, unless such suit might have been prosecuted in such court * * * if no assignment had been made." The district court sustained the

plea to its jurisdiction. On appeal to the circuit court Justice Story held the district court had jurisdiction. He pointed out that the mischief to be remedied by the provision of the Judiciary Act was imposition on the jurisdiction of the federal courts by the assignment of negotiable instruments in order to create diversity of citizenship. The case brought by the Government of course was not within the mischief. Justice Story applied the principle of statutory construction that legislative acts do not "embrace the sovereign power or government, unless expressly named or included by necessary implication" (p. 34) and concluded that even though the broad language of the Judiciary Act taken literally embraced all cases of the class it did not extend to suits brought by the sovereign.

On the principle of the *American Bell Telephone Co.* case and like decisions, if a suit could conceivably arise under the 1887 Act in which the United States might seek review of an order of remand, the prohibition contained in that act would not bar this Court from granting review to the sovereign. *A fortiori* the prohibition cannot possibly be extended to bar either this Court or the court below from granting review to the Government in cases arising under a much later independent statute enacted for a purpose entirely unrelated to the 1887 Act.

III

A PROCEEDING WHICH MAY RESULT IN A DECREE DETERMINING THE RESTRICTED INDIAN HEIRS OF A RESTRICTED ALLOTTEE AND DETERMINING THEIR RIGHTS TO THE RESTRICTED ESTATE OF THE DECEDENT IS REMOVABLE UNDER SECTION 3 OF THE ACT OF 1926.[7]

The Government does not seek to compel administration of the unrestricted estate in the district court. Apparently the respondent misapprehended the Government's position. *In re Micco's Estate*, 59 F. Supp. 434, 435–436. At the trial court's request the Government briefed the question of whether the court may exercise complete probate jurisdiction (*id.* p. 435), concluding, as should in all fairness be noted here, that the court did have such jurisdiction, but specifically stating (p. 11) that—

> However, since no court, either state or federal, acquires jurisdiction to administer the restricted property comprising the estate, it is, as a matter of fact, immaterial to the Government whether that part of the proceedings which relates solely to the disposition of the unrestricted estate remains in the federal court or is remanded to the state court. The Government's main concern is with the protection of the restricted property and with the protection of the rights of the restricted Indian heirs in the estate. * * *

[7] This question is discussed in the event the Court should decide to dispose of the whole controversy.

The United States does not seek administration of the unrestricted estate. Its demands are clearly specified in its complaint in intervention. Its interest is limited to a determination of heirs—since that determination fixes the rights of the Indians to restricted property—and to the determination of which property is restricted. There is no governmental interest in the unrestricted assets subject to the control of the administrator. For that reason it is immaterial to the Government whether the federal court retains the entire proceeding—as is the present practice in the Northern District of Oklahoma, or whether it follows what is probably the more expedient plan of reserving jurisdiction to determine heirs and remanding the remainder of the case for administration as was done in the case entitled *In re Estate of Jackson Barnett,* No. 4556 Eq. (E. D. Okla.).[8] It is, however, very material to the Government that so much of the proceeding as results in a determination of the ultimate rights of restricted Indian heirs in restricted property be held to fall within the scope of section 3 of the 1926 Act.

Section 3 provides that by service of notice upon the Superintendent for the Five Civilized Tribes the United States may be bound to a "suit" "to which a restricted member of the Five Civilized Tribes in Oklahoma, or the restricted heirs * * *

[8] The unreported opinion is set out in the Appendix, pp. 51–65.

of such Indian are parties, as plaintiff, defendant or intervenor, and claiming or entitled to claim title to or an interest in lands allotted to a citizen of the Five Civilized Tribes or the proceeds, issues, rents, and profits derived from the same * * *." Section 3 also confers on the United States "the right to remove any such suit" to the United States district court and upon removal the federal district court is given jurisdiction "to hear and determine said suit."

The *Peter Micco* case originated in the county court by the filing of a petition for the appointment of an administrator. Since the intestate died seized of unrestricted as well as restricted property the general jurisdiction of the county court was invoked. 58 Okla. Stats. Ann. secs. 631–634. Under those sections the probate courts of Oklahoma have jurisdiction to determine heirship as an incident to final distribution. By force of the Act of June 14, 1918, c. 101, sec. 1, 40 Stat. 606, complemented by Chap. 25 Okla. Laws 1919 (84 Okla. Stats. Ann. secs. 251–256) the jurisdiction to determine heirship extends not only to the unrestricted property but to the restricted property as well. *Hardridge* v. *Hardridge*, 168 Okla. 7, 13 (1934); *Moore* v. *Jefferson*, 190 Okla. 67, 70 (1942).

The essential question is whether such a proceeding falls within the ambit of section 3 of the 1926 Act. The court below has described the scope of

the section as "broad." *United States* v. *Fixico*, 115 F. 2d 389, 393. "It is not confined to cases in which title to land is involved. It extends to any case in which any other interest in restricted land is in issue. It must be presumed that the Congress chose that broad language with deliberation and studied purpose. And any cause fairly within the reach of the section may be removed under its provisions." *Id.* p. 392.

To be within the purview of section 3, the *Peter Micco* case must be (1) a "suit" (2) to which the restricted heirs of a restricted member of the Five Civilized Tribes are parties (3) claiming or entitled to claim title to or an interest in allotted lands or the proceeds, issues, rents, and profits derived from those lands. If those three elements are present, the case is removable and the federal court has jurisdiction.

A. THE THREE REQUISITES OF SECTION 3 ARE SATISFIED

1. The requisite as to "suit" is satisfied

The term "suit" was broadly defined in *Weston* v. *The City Council of Charleston*, 2 Pet. 449, 464, where Chief Justice Marshall stated:

> The term is certainly a very comprehensive one, and is understood to apply to any proceeding in a court of justice, by which an individual pursues that remedy in a court of justice which the law affords him. The modes of proceeding may be various, but if a right is litigated between parties in

a court of justice, the proceeding by which the decision of the court is sought is a suit.

a. *The laws of Oklahoma afford a court of justice and a mode of procedure for establishing a right of heirship.*

The laws of Oklahoma afford a court of justice—the county court—and a mode of procedure for establishing a right of heirship. The county court is created by the State Constitution, Art. VII, sec. 11. It has probate jurisdiction. 58 Okla. Stats. Ann. sec. 1. It is a court of record. Oklahoma Constitution, Art. VII, sec. 11; *Petroleum Auditors Assn. v. Landis*, 182 Okla. 297, 298–299 (1938). All issues of fact joined in the county court must be tried in that court. The court makes written findings and conclusions, enters judgments and enforces them as in civil actions generally. 58 Okla. Stats. Ann. sec. 709. The proceedings, records, and judgments of the county court are accorded the same dignity, force, and effect as those of the state district courts. 58 Okla. Stats. Ann. sec. 2; *In re Green's Estate*, 80 Okla. 256 (1921); *Petroleum Auditors Assn. v. Landis, supra*, p. 299. Heirship may be determined as an incident to distribution, 58 Okla. Stats. Ann. sec. 631, or under the special statutory method. 84 Okla. Stats. Ann. 251–256. Under either procedure the court must render a decree determining the heirs. 58 Okla. Stats. Ann. sec. 632, 84 Okla. Stats. Ann. sec. 254. An appeal will lie. 58 Okla. Stats. Ann. sec. 721, 84 Okla. Stats. Ann. sec. 255.

b. *A contest is present but none is necessary to have a "suit"*

At the time the *Peter Micco* case was removed there was a contest pending created by the United States Probate Attorney's motion to dismiss, filed in behalf of some of the Indian heirs apparent. In addition, the county court had undertaken a preliminary determination of heirs in a proceeding of which no notice of any kind had been given. This was done at a so-called "hearing" held four days prior to the date on which it had been duly scheduled. *Merrell v. United States*, 140 F. 2d 602, 605 (C. C. A. 10). Of course, failure to notify interested parties cut off any potential contest, but no such unorthodox procedure prevails to smother a "suit."

In any event, the law is clear that to have a "suit," as, for instance, in an action to quiet title against unknown parties, there need not be active adversary parties. When the petition for administration was filed the judicial process was invoked looking towards a decree of distribution and a determination of heirs. 58 Okla. Stats. Ann. sec. 631. Embraced in that petition was the right of the restricted Indians there named to have their status as heirs established. These heirs were present as constructive parties. Cf. *Walker v. Spencer*, 123 F. 2d 347, 349 (C. C. A. 10), certiorari denied, 316 U. S. 692. When the petition was filed there was a "suit"—the suit of the petitioner and the suit of the heirs whose

interests he purported to represent. Cf. *Ex Parte Milligan*, 4 Wall. 2, 113. In the *Milligan* case speaking of an application for a writ of habeas corpus this Court said (p. 113):

> When the petition is filed and the writ prayed for, it is a *suit*,—the suit of the party making the application.

Cf. *Tutun* v. *United States*, 270 U. S. 568, 577, where an unopposed petition for naturalization was held to be a "case" within the meaning of the Circuit Courts of Appeals Act of March 3, 1891, c. 517, sec. 6, 26 Stat. 826, 828. Hence, we submit, the proceeding initiated in the county court by the petition for administration satisfies the requisite of section 3 as to "suit."

2. *The requisite as to parties is satisfied*

Admittedly, at the time of removal the proceedings had not reached the stage where the parties were denominated "plaintiff, defendant or intervenor."[9] As used in section 3 that phrase manifestly is merely descriptive. Certainly no serious consideration would be given to the contention that by labeling parties "petitioner," "complainant" or "respondent" a proper suit could be placed outside the operation of section 3.

[9] Under the Oklahoma Code "All issues of fact joined in the county court must be tried by said court, and in all such proceedings, the party affirming is *plaintiff*, and the one denying or avoiding is defendant." 58 Okla. Stats. Ann. sec. 709. [Italics supplied.]

The test is whether the party is pursuing a remedy or asserting a right which might be pursued or asserted by one in the position ordinarily occupied by a plaintiff, defendant or intervenor. So understood, the phrase "plaintiff, defendant or intervenor" probably embraces the entire gamut of parties litigant. Thus the circuit court of appeals has held that an action against the administrator of an Indian's estate where none of the formal parties were Indians was a "suit" within section 3. The court held that since the interests of the restricted Indian heirs would be bound by any judgment rendered in favor of the plaintiff those heirs were constructively present as parties. *Walker* v. *Spincer*, 123 F. 2d 347, 349, certiorari denied 316 U. S. 692.

We submit that the *Peter Micco* case satisfies the requisite of section 3 as to parties since restricted Indians of the Five Civilized Tribes are claiming restricted property as heirs of a restricted member of the Five Civilized Tribes. *Merrell* v. *United States*, 140 F. 2d 502, 504 (C. C. A. 10); *In re Micco's Estate*, 59 F. Supp. 434, 435 (E. D. Okla.).

3. *The requisite as to the nature of the claims satisfied*

Section 3 requires that the suit be one in which the restricted heirs are "claiming or entitled to claim title to or an interest in lands allotted to a citizen of the Five Civilized Tribes or the pro-

ceeds, issues, rents and profits" derived from those lands. As already pointed out, *supra*, pp. 32–33, the initiation of proceedings by the filing of a petition for the appointment of an administrator invoked the jurisdiction of the county court to make a final determination of heirship for the purpose of determining who is entitled to the restricted assets. The determination of heirship fixes the right of the heirs to inherit in the estate. *White House Lumber Co.* v. *Haywood*, 142 Okla. 163, 165 (1930). The county court's finding as to heirship even when made incidental to the distribution is *res judicata* as to the heirs, the legatees, devisees or heirs and heirs of heirs claiming or claiming for a share in the estate. *Wells* v. *Helms*, 105 F. 2d 102 (C. C. A. 10); *In re Thompson's Estate*, 179 Okla. 240, 243 (1937).

In other words, in the *Pratt, Mecom* case the rights of restricted Indians to restricted property depend on the determination of whether they are heirs of the decedent. Indians in that situation are claiming title to or an interest in restricted

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In that case the Supreme Court of Oklahoma stated (p. 165): "The probate procedure of the state controls the manner of passing of the title to the real estate and the heir is dependent for his title, not only upon the statutes of succession * * * but upon the probate procedure for the determination and distribution thereof."

Of course the chief cases were not concerned with the question of whether the United States is bound to such a proceeding in the absence of notice under section 3. *Anderson* v. *Pack*, 53 F. 2d 257 (C. A. 10, Okla.) (all on other grounds *Roberts* v. *Anderson*, 66 F. 2d 854 (C. C. A. 10).

property. In fact they are claiming ownership of such property. It may be that the only direct issue is the determination of their status as heirs. But there can be no doubt of the issue at stake. The Indians seek the determination of their status as heirs to obtain a binding adjudication which will be incontestable evidence of their ownership of property. The Supreme Court of Oklahoma expressed this manifest conclusion in *Homer* v. *Lester*, 95 Okla. 284 (1923), where the court stated (p. 289):

> No court can determine that question [who are the heirs] without trying the title to the land. No ingenious reasoning can avoid the plain, obvious conclusion that the answer to the question "who are the heirs of Thomas J. Taylor?" determines whether these defendants are the owners of the land.

B. AS RESPECTS THE REQUISITES OF SECTION 3 THERE IS NO CONTROLLING DIFFERENCE BETWEEN AN HEIRSHIP PROCEEDING AND A CONTESTED WILL CASE

The circuit court of appeals found the requisites of section 3 present in *Caesar* v. *Burgess*, 103 F. 2d 503 where it held (p. 507) that section 3 was "broad enough to authorize the removal of a contested proceeding for the probate of a will executed by a full-blood restricted Creek Indian whose estate consists exclusively of restricted lands, and restricted moneys in the custody of the Secretary of the Interior, devising the whole of such estate to Indian legatees."

Insofar as the applicability of section 3 is concerned, there is no controlling difference between the *Burgess* case where the restricted allottee died testate and this case where the restricted allottee died intestate. In both instances the restricted allottees died seized of restricted property. In both instances the judicial processes of the county court were invoked. In both instances persons claiming to be restricted Indians asserted they were entitled to the property of the decedent and sought establishment of their status as heirs or devisees to the end of obtaining judicial confirmation of their right to the property.

The presence of a will offers no controlling distinction. The ultimate effect of the probate proceeding is the same whether the allottee died testate or intestate. Where a valid will is left it operates as an alienation of restricted property. *Caesar* v. *Burgess*, 103 F. 2d 503, 507 (C. C. A. 10), and cases there cited. Where no will is left the restricted property passes to the heirs by force of the state laws of succession made applicable by the Oklahoma Enabling Act of June 16, 1906, c. 3335, secs. 13, 21, 34 Stat. 267; *Jefferson* v. *Fink*, 247 U. S. 288, 294. There is no difference between the two with respect to ultimate ownership. The fact that in one instance there is a written instrument and in the other a statute does not alter the fact that in both cases there is a judicial confirmation of a transfer of title.

C. THE HOLDINGS OF THE DISTRICT COURT IN THE PETER MICCO CASE ARE CONTRARY TO THE PURPOSE OF SECTION 3

The conclusion of the district court that the *Peter Micco* case does not fall within the purview of section 3 is within neither the letter nor the spirit of that section. The circuit court of appeals consistently has given a liberal construction to the section to carry out the broad general purposes of the statute so as to enable litigants claiming an interest in allotted lands or in the proceeds of such lands to file suits in the state courts, serve notice upon the Superintendent for the Five Civilized Tribes and thus bind the United States by the result of the litigation. *Caesar* v. *Burgess*, 103 F. 2d 503; *United States* v. *Fixico*, 115 F. 2d 389, 392; *Walker* v. *Spencer*, 123 F. 2d 347, 349, certiorari denied, 316 U. S. 692; *House* v. *United States*, 144 F. 2d 555, 559, certiorari denied, 323 U. S. 781; *Butler* v. *Denton*, 150 F. 2d 687, 689.

In the face of those decisions the district court gave an extremely narrow construction to section 3. It concluded that section 3 provides for service of notice only in actions where "the United States is an indispensable party." 59 F. Supp. 434, 440. That holding, we think, is completely erroneous. The Government is an indispensable party only to actions to condemn or partition restricted Indian land where the judicial proceeding itself results in an alienation and the creation of a new title. *Minnesota* v. *United States*, 305

U. S. 382; *United States* v. *Hellard*, 322 U. S. 363. Section 3 was unnecessary to authorize suit against the United States in such cases. Prior to the enactment of section 3 the United States had consented to be sued in proceedings to condemn or to partition restricted Indian land. Act of March 3, 1901, c. 832, sec. 3, 31 Stat. 1083–84, 25 U. S. C 357; Act of June 14, 1918, c. 101, sec. 2, 40 Stat. 606, 25 U. S. C. 355. As a matter of fact the court below has held that actions to condemn restricted Five Tribes land do not fall within the ambit of section 3. *Town of Okemah* v. *United States*, 140 F. 2d 963. It follows that the effect of the district court's conclusion gives no meaning to section 3. Under its interpretation the only cases to which section 3 would apply would be actions to partition restricted Five Tribes land and even before section 3 the United States could be sued in such actions by serving the United States through its Attorney General and United States Attorney. See *United States* v. *Hellard*, 322 U. S. 363, 368–369. More than that the district court's conclusion is in direct conflict with its own prior practice, that of its sister court in the northern district, and the action of the circuit court of appeals in consistently entertaining jurisdiction in dozens of cases removed under section 3 where the United States was merely a proper but not an indispensable party, such as will proceedings, actions to determine

heirs, to cancel conveyances, to foreclose mortgages, to set aside trust agreements, to quiet title, to recover possession, to collect rentals, to recover damages for trespass, and to establish the tax immunity of restricted property. See, e. g., *Caesar* v. *Burgess*, 103 F. 2d 503 (C. C. A. 10); *United States* v. *Lee*, 108 F. 2d 936 (C. C. A. 10); *United States* v. *Fixico*, 115 F. 2d 389 (C. C. A. 10); *Scott* v. *Beams*, 122 F. 2d 777 (C. C. A. 10), certiorari denied, 315 U. S. 809; *Walker* v. *Spencer*, 123 F. 2d 347 (C. C. A. 10), certiorari denied, 316 U. S. 692; *United States* v. *Williams*, 139 F. 2d 83 (C. C. A. 10), certiorari denied, 322 U. S. 727; *United States* v. *Anglin & Stevenson* (C. C. A. 10), 145 F. 2d 622, certiorari denied, 324 U. S. 844.

The holding of the district court that section 3 applies only to cases where the United States is an indispensable party and the holding that the county courts proceedings did not constitute a "suit" within section 3, demonstrate the results of a narrow construction of that section. Thus the district court was compelled to the conclusion that the way now was open for the United States to institute an original action to determine who are the heirs and what property is restricted, 59 F. Supp. 434, 441. The relitigation of identical issues, which the district court conceived to be the correct procedure, is exactly the sort of mischief Congress sought to remedy by section 3 of the 1926 Act. There can be no

certainty of titles or of rights in lands allotted to Indians of the Five Civilized Tribes so long as the United States cannot be bound in a single action. If the district court is correct, the only cases removable under that section would be partition suits. *United States* v. *Hellard*, 322 U. S. 363. Tested by the consequences of the district court's holding, it is evident that if the decision in the *Peter Micco* case stands, the purpose of section 3 will be defeated and the statute negated.

IV

THE DECISION IN THE PETER MICCO CASE IS A DEPARTURE FROM ESTABLISHED LAW AND CREATES DOUBT AS TO THE VALIDITY OF NUMEROUS TITLES AND PROPERTY RIGHTS

Ever since the enactment of section 3 notices of pendency have been served in proceedings seeking the determination of heirs. So far as the Government is aware the judgment in the *Peter Micco* case is the lone decision rendered during the 20-year period since the 1926 Act holding the federal court is without jurisdiction of such a proceeding upon removal under section 3. The action of the district court in *Merrell* v. *United States*, 140 F. 2d 602 (C. C. A. 10) removes all doubt as to the law in the Northern District of Oklahoma. Over eleven years ago Circuit Judge Williams, now retired, then district judge for the Eastern District of Oklahoma, wrote an exhaus-

tive opinion overruling a motion to remand and holding that section 3 embraced a proceeding on all fours with the *Peter Micco* case. *In re Estate of Jackson Barnett,* No. 4556 Eq. (unreported opinion filed in 1934).[12] There had been no departure from that holding prior to the *Peter Micco* case. The federal court for the Eastern District of Oklahoma entertained jurisdiction and entered final decrees in the last heirship cases considered prior to the *Peter Micco* case.[13]

While the court below has never expressly passed on the exact question, by implication the jurisdiction of the federal courts in heirship proceedings was recognized in *Scott* v. *Beams,* 122 F. 2d 777, certiorari denied, 315 U. S. 809, and in *United States* v. *Anglin & Stevenson,* 145 F. 2d 622, certiorari denied, 324 U. S. 844. The point is

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[12] The text of the opinion is set out in the Appendix, pp. 51–65. That proceeding, like the *Peter Micco* case, originated in the county court by the filing of a petition for administration. Later it was consolidated for trial with two actions to quiet title removed from state district courts. *Scott* v. *Beams*, 122 F. 2d 777, 780 (C. C. A. 10), certiorari denied, 315 U. S. 809.

[13] *In the matter of the Estate of Isaac Houston et al.*, No. 1073 Civil, decree of heirship entered November 5, 1943; *In the Matter of the Estate of Daniel Smith*, Civil No. 953, judgment determining heirs entered April 9, 1943—the proceeding originated by filing a petition for administration in the county court; *In the Matter of the Estate of Watson Palmer*, Civil No. 864, judgment determining heirs entered October 26, 1942, sub. nom. *Emma Palmer et al.* v. *The heirs, etc., of Watson Palmer.*

that in reliance on the established law title rights have vested in hundreds of cases and large amounts of money have been distributed, e. g., *United States* v. *Anglin & Stevenson, supra,* where over $300,000 in attorneys' fees and expenses were paid out, and *Scott* v. *Beams, supra,* where over a million dollars was divided among the heirs.

The effect of the *Peter Micco* decision is to exclude a large class of cases (an average of 200 a year) from the provisions of section 3 and to bar the United States from obtaining review of orders of remand in other classes of cases arising under section 3.[14] If the decision in the *Peter Micco* case stands, notices served in hundreds of heirship cases in which the United States did not appear would be ineffective to bind the Government and the decrees in those cases would be open to attack. Doubt would be cast on the validity of numerous titles, property rights would be unsettled and a great deal of litigation probably would ensue. Further, the decision creates a conflict between the only two federal district

[14] Since the enactment of section 3 the Superintendent for the Five Civilized Tribes has been served with about 6,230 notices. Beginning with 1937 notices have been served in an average of over 600 cases each year. Of these an average of about one-third are heirship proceedings such as the *Peter Micco* case. The number of notices served has increased in almost unbroken progression since 1937. 1926–36, inc.—750 notices served; 1937—345; 1938—371; 1939—505; 1940—597; 1941—616; 1942—770; 1943—746; 1944—749; 1945—781 up to November 15, 1945.

courts dealing with the property rights of deceased Indians of the Five Civilized Tribes since under the law in the northern district of Oklahoma heirship proceedings are within the scope of section 3.

In these circumstances it is believed that this Court should review the novel construction placed upon section 3 by the respondent. Aside from the decision in the *Peter Micco* case the construction sought by the Government is in conformity with the established law of the two districts and will not jeopardize titles and property rights. The other, the stringent construction adopted in the *Peter Micco* case, is a departure from established law, will unsettle titles and property rights and may lead to a great deal of litigation. In view of these considerations, the effect of the hundreds of decrees rendered in the past sustaining titles and fixing property rights should not be disregarded. Cf. *McDougal* v. *McKay*, 237 U. S. 372, 385; *Doolittle* v. *Bryan*, 14 How. 563, 567.

CONCLUSION

It is submitted that, if the court concludes that the judgment of remand is not appealable, the Government's motion that the Court order up the entire record and decide the whole matter in controversy should be granted and a writ of mandamus issued directing the respondent to vacate the judgment entered March 6, 1945, in the *Peter*

Micco case and to hear and determine that cause upon the issues and the merits.

Respectfully submitted.

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JANUARY 1946

APPENDIX

Section 2 of the Judiciary Act of March 3, 1887, c. 373, 24 Stat. 552 as embodied into section 28 of the Judicial Code, 28 U. S. C. 71 (Act of March 3, 1911, c. 231, sec. 28, 36 Stat. 1094), provides:

> Any suit of a civil nature, at law or in equity, arising under the Constitution or laws of the United States, or treaties made, or which shall be made, under their authority, of which the district courts of the United States are given original jurisdiction by this title, which may now be pending or which may hereafter be brought, in any State court, may be removed by the defendant or defendants therein to the district court of the United States for the proper district. Any other suit of a civil nature, at law or in equity, of which the district courts of the United States are given jurisdiction by this title, and which are now pending or which may hereafter be brought, in any State court, may be removed into the district court of the United States for the proper district by the defendant or defendants therein, being nonresidents of that State. And when in any suit mentioned in this section there shall be a controversy which is wholly between citizens of different States, and which can be fully determined as between them, then either one or more of the defendants actually interested in such controversy may remove said suit into the district court of the United States for the proper district.

And where a suit is now pending, or may hereafter be brought, in any State court, in which there is a controversy between a citizen of the State in which the suit is brought and a citizen of another State, any defendant, being such citizen of another State, may remove such suit into the district court of the United States for the proper district, at any time before the trial thereof, when it shall be made to appear to said district court that from prejudice or local influence he will not be able to obtain justice in such State court, or in any other State court to which the said defendant may, under the laws of the State, have the right, on account of such prejudice or local influence, to remove said cause: *Provided*, That if it further appear that said suit can be fully and justly determined as to the other defendants in the State court, without being affected by such prejudice or local influence, and that no party to the suit will be prejudiced by a separation of the parties, said district court may direct the suit to be remanded, so far as relates to such other defendants, to the State court, to be proceeded with therein. At any time before the trial of any suit which is now pending in any district court, or may hereafter be entered therein, and which has been removed to said court from a State court on the affidavit of any party plaintiff that he had reason to believe and did believe that, from prejudice or local influence, he was unable to obtain justice in said State court, the district court shall, on application of the other party, examine into the truth of said affidavit and the grounds thereof, and, unless it shall appear to the satisfaction of said court that said

party will not be able to obtain justice in said State court, it shall cause the same to be remanded thereto. Whenever any cause shall be removed from any State court into any district court of the United States, and the district court shall decide that the cause was improperly removed, and order the same to be remanded to the State court from whence it came, such remand shall be immediately carried into execution, and no appeal or writ of error, from the decision of the district court so remanding such cause shall be allowed: *Provided*, That no case arising under an Act entitled "An Act relating to the liability of common carriers by railroad to their employees in certain cases," approved April twenty-second, nineteen hundred and eight, or any amendment thereto, and brought in any State court of competent jurisdiction shall be removed to any court of the United States.

Section 239 of the Judicial Code as amended by Act of February 13, 1925, c. 229, sec. 1, 43 Stat. 938, 28 U. S. C. 346, provides:

In any case, civil or criminal, in a circuit court of appeals, or in the Court of Appeals of the District of Columbia, the court at any time may certify to the Supreme Court of the United States any questions or propositions of law concerning which instructions are desired for the proper decision of the cause; and thereupon the Supreme Court may either give binding instructions on the questions and propositions certified or may require that the entire record in the cause be sent up for its consideration, and thereupon shall decide the whole matter in controversy in the

same manner as if it had been brought there by writ of error or appeal.

Section 3 of the Act of April 12, 1926, c. 115, 44 Stat. 239, provides:

> Any one or more of the parties to a suit in the United States courts in the State of Oklahoma or in the State courts of Oklahoma to which a restricted member of the Five Civilized Tribes in Oklahoma, or the restricted heirs or grantees of such Indian are parties, as plaintiff, defendant, or intervenor, and claiming or entitled to claim title to or an interest in lands allotted to a citizen of the Five Civilized Tribes or the proceeds, issues, rents, and profits derived from the same, may serve written notice of the pendency of such suit upon the Superintendent for the Five Civilized Tribes, and the United States may appear in said cause within twenty days thereafter, or within such extended time as the trial court in its discretion may permit, and after such appearance or the expiration of said twenty days or any extension thereof the proceedings and judgment in said cause shall bind the United States and the parties thereto to the same extent as though no Indian land or question were involved. Duplicate original of the notice shall be filed with the clerk of the court in which the action is pending and the notice shall be served on the Superintendent for the Five Civilized Tribes or, in case of his absence from his principal office, upon one of his assistants, and shall be served within ten days after the general appearance in the case of the party who causes the notice to be issued. The notice shall be accompanied by a certified copy of all pleadings

on file in the suit at the time of the filing of the duplicate original notice with the clerk and shall be signed by the party to the action or his or her counsel of record, and shall be served by the United States marshal and due return of service made thereon, showing date of receipt and service of notice. If notice is not served within the time herein specified, or if return of service thereof be not made within the time allowed by law for the return of service of summons, alias notices may be given until service and return of notice is had and in no event shall the United States be bound unless written notice is had as herein specified: *Provided*, That within twenty days after the service of such notice on the Superintendent for the Five Civilized Tribes or within such extended time as the trial court in its discretion may permit the United States may be, and hereby is, given the right to remove any such suit pending in a State court to the United States district court by filing in such suit in the State court a petition for the removal of such suit into the said United States district court, to be held in the district where such suit is pending, together with the certified copy of the pleadings in such suit served on the Superintendent for the Five Civilized Tribes as hereinbefore provided. It shall then be the duty of the State court to accept such petition and proceed no further in said suit. The said copy shall be entered in the said district court of the United States within twenty days after the filing of the petition for removal and the defendants and intervenors in said suit shall within twenty days thereafter plead, answer, or demur to the declaration or com-

plaint in said cause, and the cause shall then proceed in the same manner as if it had been originally commenced in said district court, and such court is hereby given jurisdiction to hear and determine said suit, and its judgment may be reviewed by certiorari, appeal, or writ of error in like manner as if the suit had been originally brought in said district court.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF OKLAHOMA

No. 4556 Equity.

IN RE ESTATE OF JACKSON BARNETT, DECEASED

On May 21, 1934, Willie Conner and Rebecca J. Baker filed application in the County Court of Muskogee County, State of Oklahoma, by petition for letters of administration upon the estate of Jackson Barnett, deceased, asking that Ferd P. Snider be appointed administrator. By proper order said application was set for hearing on June 14, 1934, at ten A. M. On June 4, 1934, Melviney Ditzler appeared specially and filed objection to the jurisdiction of the court, contending that the jurisdiction rested in the County Court of Okmulgee County, State of Oklahoma. On same date Jimmie (Jimmy) Barnett and Nellie Barnett appeared specially objecting to the jurisdiction in the court, with the contention that the jurisdiction rested in the County Court of Okmulgee County, Oklahoma. John Conner on June 8, 1934, filed a response admitting that Jackson Barnett, deceased, was enrolled as a full blood Creek

Indian, Roll No. 9213; that the heirs set forth in the petition filed herein were correct and all full blood Creek Indians, and he prayed that administration be had as prayed for in said petition; that the heirs mentioned therein be declared and determined to be the sole and only heirs of the said Jackson Barnett, deceased. On June 8, 1934, a purported notice of pendency of suit in said matter was addressed to the Superintendent of the Five Civilized Tribes, notifying him that said cause is pending in the County Court of Muskogee County, Oklahoma, and that said suit involves the estate of Jackson Barnett, deceased, who was a full blood Creek Indian and involves the disposition of the original allotment of the said Jackson Barnett, which is restricted, and also funds in the hands of the Superintendent for the Five Civilized Tribes, which funds are restricted, and that the heirs of the said Jackson Barnett, deceased, are full blood Creek Indians, and that John Conner is a full blood Creek Indian and an heir to said estate. Lewis Fisher, Melvina Ditzler, Annie Beams, Mariah Thompkins, Nellie Barnett and Mahaley Hickman, claiming to be nephews and nieces of the said Jackson Barnett, deceased, and full blood Creek Indians, appeared specially and moved the court to dismiss the petition for letters of administration, 1st, because the court is without jurisdiction to appoint an administrator of said estate, for the reason that Muskogee County was not the residence of Jackson Barnett at the time of his death, nor was it ever the residence of Jackson Barnett; 2nd, that said decedent was abducted from his home in Okmulgee County, Oklahoma, on or about February 23, 1920, by one

Anna Laurie Lowe, and has continually been kept from returning to his said home in Okmulgee County since that date until his death, through the undue influence and connivance of the said Anna Laura Lowe; and that said Jackson Barnett was domiciled and had been a resident for more than forty years preceding his abduction in February, 1920, of Okmulgee County, Oklahoma, and that said county is the county of his residence and the County Court of Okmulgee County, Oklahoma, is the court having jurisdiction to make settlement of the estate of the said Jackson Barnett. On June 11, 1934, the petition of Willie Conner et al. asking for continuance of hearing of petition to appoint administrator and for order resetting same for hearing was filed, and same was granted and the case re-set for hearing on July 16, 1934, at ten o'clock A. M. On July 27, 1934, the United States of America as petitioner, by its solicitor W. F. Rampendahl, United States Attorney for the Eastern District of Oklahoma, and acting on auhority of the Attorney General of the United States, and at the request of the Secretary of the Interior, filed its motion therein for an extension of time in which to file its petition to remove said cause to the United States District Court for the Eastern District of Oklahoma, as provided in Section 3 of the Act of Congress approved April 12, 1926 (44 Stat. 239), entitled: "An Act to Amend Section 9 of the Act of May 27, 1908, * * *" averring that said matter involved restricted allotted lands and restricted income therefrom of the estate of Jackson Barnett, a full blood Creek Indian Roll No. 4524, who died intestate in the

State of California on May 29, 1934. Proper order was entered on said date extending time for thirty days from and after said date in which to file in said cause its petition for removal from the County Court of Muskogee County, Oklahoma, to the United States District Court for the Eastern District of Oklahoma. On July 15, 1934, by proper order, said cause was removed to this court. Motion has been duly made for same to be remanded to the County Court of Muskogee County, Oklahoma.

Prior to such removal issue was joined in said court averring that the heirs were correct as set out in said petition or pleadings, and that all of the said heirs named therein are full-blood Creek Indians heirs of Jackson Barnett, deceased, enrolled as a full-blood Creek Indian, and prayed that the heirs therein mentioned be declared and determined to be the sole and only heirs of said Jackson Barnett, deceased. It is averred that said suit involved the estate of Jackson Barnett, deceased, a full-blood Creek Indian, and involved the disposition of the original allotment of said Jackson Barnett, which is restricted, and also funds in the hands of the Superintendent for the Five Civilized Tribes, which funds are restricted, and that the heirs of said Jackson Barnett, deceased are full-blood Creek Indians.

The petition for removal is based on Section 3 of Act of Congress approved April 12, 1926 (44 Stat. 239, entitled "Act to Amend Section 9 of the Act of May 27, 1908, * * *" which provided:

> Any one or more of the parties to a suit in the United States courts in the State of Oklahoma or in the State Courts of

Oklahoma to which a restricted member of the Five Civilized Tribes in Oklahoma, or the restricted heirs of such Indians are parties, as plaintiff, defendant, or intervener, and claiming or entitled to claim title to or an interest in lands allotted to a citizen of the Five Civilized Tribes, or the proceeds, issues, rents and profits derived from the same, may serve written notice of the pendency of such suit upon the Superintendent for the Five Civilized Tribes, and the United States may appear in said cause within twenty days thereafter, or within such extended time as the trial court in its discretion may permit, and after such appearance or the expiration of said twenty days or any extension thereof the proceedings and judgment in said cause shall bind the United States and the parties thereto, to the same extent as though no Indian land or question were involved. . . . Provided, That within twenty days after the service of such notice on the Superintendent for the Five Civilized Tribes or within such extended time as the trial court in its discretion may permit the United States may be, and hereby is, given the right to remove any such suit pending in a State court to the United States district court by filing in such suit in the State court a petition for the removal of such suit into the said United States district court, to be held in the district where such suit is pending, together with the certified copy of the pleadings in such suit served on the Superintendent for the Five Civilized Tribes as hereinbefore provided. It shall then be the duty of the State Court to accept such petition and proceed no further in said suit.

In *United States* v. *Mid-Continent Petroleum Corporation*, 67 Fed. (2d) 37, it is said:

> The Hosey-Guthrie Group contend that the case was improperly removed, and that the Federal court is without jurisdiction. They assert that on the death of Ullie Eagle the land in question ceased to be restricted, and therefore that no restriction member of the Five Civilized Tribes in Oklahoma, or restricted heir or grantee of such Indian was party as "plaintiff, defendant, or intervener * * * claiming * * * title to or an interest in lands allotted to a citizen of the Five Civilized Tribes." It was alleged in the notice and in the petition for removal that a large number of persons who were either parties defendant or interveners were restricted members of the Five Civilized Tribes and claimed some right, title, and interest in such land. This allegation is not challenged either by pleading or proof. At the time of the filing of the petition for removal, Lizzie Tiger nee Gambler, and Isla Wolf were parties to the action. The notice and petition for removal alleged that they were restricted members of the Five Civilized Tribes. The proof shows that both were enrolled full-blood citizens of the Creek Tribe. Lands passing to full-blood heirs remain under qualified restrictions by virtue of section 9 of the Act of May 27, 1908 (35 Stat. 312, 315); *Parker* v. *Richard*, 250 U. S. 235, 39 S. Ct. 442, 63 L. Ed. 954; *United States* v. *Gypsy Oil Co.* (C. C. A. 8) 10 F. (2d) 487; *Holmes* v. *United States* (C. C. A. 10) 53 F. (2d) 960. Thus it will be seen that there were parties to the action who were clearly within the class designated in section 3, supra.

In said opinion it is further said:

> The Hosey-Guthrie Group assert that section 3, supra, does not of itself give a Federal court jurisdiction on removal, but that other independent grounds of Federal jurisdiction must exist. Such a construction is contrary to the express terms of section 3, supra, and would make the removal provision thereof superfluous and useless.

In Re Will of Hicks Palmer, Deceased, No. 4284 Equity, on a motion to remand in this district the question of jurisdiction of said court under said section 3 was raised after the suit had been removed to this court by the United States Government, the motion to remand being made on the part of the principal legatee in the will. In a memorandum this court said:

> The question in this case is whether these proceedings are in the nature of a suit or cause within the meaning of this removal act of April 12, 1926. Prior to that act a proceeding to probate a will was not removable to the United States District courts on account of a diversity of citizenship. The probating of this will involves the title to the allotment of a restricted Indian and to the restricted funds of a restricted Indian and to restricted lands of a restricted Indian or claimed by a restricted Indian. The jurisdiction of this court in such a matter was within the purpose of the act of April 12, 1926, and it seems to be within the letter of the act, which had the effect of enlarging the jurisdiction of the United States District Court for such purpose.

Before deciding whether the jurisdiction is within the words of the statute, we should consider whether the particular class of acts to which this belongs is within the purpose of the statute.

Holy Trinity Church v. *U. S.*, 143 U. S. 467, 12 Sup. Ct. 511, 36 L. Ed. 226;

U. S. v. *Union Bank of Canada* (C. C. A.) 262 Fed. 91;

De Hasque v. *A. T. & S. F. Ry Co.* (Okla.) 173 Pac. 73, L. R. A. 1918 P. 259.

In *United States* v. *Smith*, 266 Fed. 741, it is said:

"It is a well-recognized rule for the construction of statutes that the terms employed by the Legislature are not to receive an interpretation which conflicts with acknowledged principles of justice and equity, if another sense, consonant with those principles, can be reasonably given to them, unless the expressed intent is so clear as to remove it from the domain of the application of rules of construction. This rule should also apply to legislation by Congress relating to Indians, when at the same time the expressed public policy of the government towards such wards is followed."

Whilst the evident purpose of this act was to afford a speedy means to quiet titles on Indian allotments, yet it is clear by thereby permitting the United States Government to be made a party for such purpose, that it was the intention of Congress that when the United States Government was brought in that it should have the privilege of having all essential adjudications made in the United States Court. To say that these statutes are to receive such strict construction that in

cases involving succession through wills or inheritance that as to probating of the wills and such matters of administration and the distribution of the estate there should be such strict construction as to leave same to state tribunals such construction of law and finding of fact, does not appear to be within the purpose of this act. To say to the restricted heir as to succession by will or distribution through an administration: "You must wait for such matters to be finally adjudicated in the state tribunal and then bring suit in ejectment and then that controversy can be brought in the United States Court," would operate so that the United States Court would be bound by the findings of fact and conclusions reached as to the probate of the will or the distribution of restricted allotted lands, or the restricted funds derived therefrom? The probation of the will or the determination of heirship and order of distribution in the state tribunal, and, thereafter the bringing of a suit in ejectment and challenge title as a result thereof, when the United States Government can be made a party thereto and remove it to the Federal Court, where the Federal Court would be bound by such action in the state court, would not be within the terms of such declared policy, for then the Federal Court would be bound by such findings and orders that became final in the state tribunal.

In said Act of April 12, 1926, the requirement for conveyances by such full-blood Indians of any interest in lands restricted by Section 1 of the Act of May 27, 1908, is extended so as to cover lands acquired by succession from an allottee by devise. The Act of January 27, 1933, relative to

restrictions applicable to Indians of the Five Civilized Tribes in Oklahoma, by Section 6, provides all appropriate proceedings to be instituted in the Federal Courts.

In *Plowden Weston et al.* v. *The City Council of Charleston*, 27 U. S. (2 Pet.) 449, Chief Justice Marshall, in speaking for the Supreme Court of the United States, said:

> The term suit is certainly a very comprehensive one, and is understood to apply to any proceeding in a court of justice, in which an individual pursues that remedy in a court of justice which the law affords him. The modes between parties in a court of justice, the proceeding by which the decision of the court is sought, is a suit.
>
> In interpreting the statutes, the court will look to the nature of the rights to be asserted and maintained rather than the manner in which the party may be obligated to proceed to assert those rights and in determining the nature of the suit regard will be had to the subject matter of the litigation. The court will examine the record and form its own conclusions as to the real nature of the proceeding, irrespective of the means by which the litigants propose to obtain the relief desired.

Federal Procedure, Vol. 1, page 807.

> Suit—broad meaning—in general—Prosecution or pursuit of some claim, demand or request; the act of suing, the process by which one endeavors to gain an end or object; attempt to attain a certain result, the act of suing; the process by which one gains an end or object. C. J. 37, page 622.
>
> The word suit is of comprehensive signification and applies to any proceeding in

> a court of justice in which a person pursues a remedy which the law affords him for the redress of an injury, or the recovery of a right and it includes both actions and proceedings.

In re Sherill, 81 N. E. 124 (N. Y. Court appeals).

In *Ex Parte Milligan*, 71 U. S. (4 Wall. 2), at page 112, it is said:

> But it is argued, that the proceeding does not ripen into a cause, until there are two parties to it. This we deny. It was the cause of Milligan when the petition was presented to the Circuit Court. It would have been the cause of both parties, if the court had issued the writ and brought those who held Milligan in custody before it. Webster defines the word "cause" thus: "A suit or action in court; any legal process which a party institutes to obtain his demand, or by which he seeks his right, or supposed right"—and he says, "this is a legal, scriptural, and popular use of the word, coinciding nearly with case, from *cado*, and action from *ago*, to urge or drive." In any legal sense, action, suit, and cause are convertible terms. Milligan supposed he had a right to test the validity of his trial and sentence; and the proceeding which he set in operation for that purpose was his "cause" or "suit." It was the only one by which he could recover his liberty. He was powerless to do more; he could neither instruct the judges nor control their action, and should not suffer, because, without fault of his, they were unable to render a judgment. But, the true meaning to the term "suit" has been given by this court. One of the questions in *Weston*

v. *City Council of Charleston,* was, whether a writ of prohibition was a suit; and Chief Justice Marshall says: "The term is certainly a comprehensive one, and is understood to apply to any proceeding in a court of justice by which an individual pursues that remedy which the law affords him." Certainly, Milligan pursued the only remedy which the law afforded him * * *. One of the questions in *Holmes* v. *Jennison et al.,* 14 Peters 540, was, whether under the 25th section of the Judiciary Act a proceeding for a writ of habeas corpus was a "suit." Chief Justice Taney held that "if a party is unlawfully imprisoned, the writ of habeas corpus is his appropriate legal remedy. It is his suit in court to recover his liberty." There was much diversity of opinion on another ground of jurisdiction; but that, in the sense of the 25th section of the Judiciary Act, the proceeding by habeas corpus was a suit, was not controverted by any except Baldwin, Justice, and he thought that "suit" and "cause" as used in the section, mean the same thing. The court does not say, that a return must be made, and the parties appear and begin to try the case before it is a suit. When the petition is filed and the writ prayed for, it is a suit—the suit of the party making the application. If it is a suit under the 25th section of the Judiciary Act when the proceedings are begun, it is, by all the analogies of the law, equally a suit under the 6th section of the Act of 1802. But it is argued, that there must be two parties to the suit, because the point is to be stated upon the request of "either party or their counsel." Such a literal and technical construction would defeat the very purpose the legislature had in view, which

was to enable any party to bring the case here, when the point in controversy was a matter of right and not of discretion; and the words "either party" in order to prevent a failure of justice, must be construed as words of enlargement, and not of restriction.'

See also *Re Wah-Kon-Tah-He-Um-Pah's Estate*, 109 Okla. 266.

In *Brohead* v. *Shoemaker, et al.*, 44 Fed. 518, Syllabus No. 1 is as follows:

> I. Removal of causes—Probate Proceeding. Under Code Ga. Secs. 2424, 2427, which provide for the probating of a will in column form by a proceeding inter parties which is conclusive as against those contesting the will, such a proceeding is a suit within the meaning of the removal statutes.

At the time *Brohead* v. *Shoemaker*, *supra*, was before the court under the provisions of the Act of Congress of August 13, 1888 (25 Stat. 433) it was provided that removals of actions pending in the state courts could be removed to United States courts on the ground of prejudice or local influence at any time before the trial.

See also *Waterman* v. *Canal-Louisiana Bank Company*, 215 U. S. 33.

CONCLUSIONS OF LAW

I conclude that this proceeding comes within the term "suit" as used in the Act of April 12, 1926, and I assume for the purpose of this case that prior to the Act of April 12, 1926, that such suit as here presented was not removable to this court.

See *In Re Cilley* (C. C. D. New Hampshire) 58 Fed. 977.

Copeland v. *Rooney* (Indiana) 72 Fed. 5.
In Re McDonald's Estate (Minnesota) 42 Fed. (2d) 266.
Ellis v. *Davis*, 109 U. S. 45.
In Re Gray's Estate (7th CCA) 66 Fed. (2d) 367.
Atwood v. *Rhode Island Hospital Trust Co.* (1st CCA) 34 Fed. (2d) 18.

In *Re Jessie's Heirs*, 259 Fed. 694, was when the County Judge was acting as a Federal Agent, and not as a court, and prior to Act of April 12, 1926, and has no application here.

The contention is further made that Section 3 of the Act of April 12, 1926 (44 Stat. 239), under which this proceeding is removed here, should be construed in connection with the Act of June 14, 1918 (40 Stat. 606), so as to permit a determination of heirship in the proper County Court, which would be binding and conclusive Federal Courts in litigated controversies where the restricted heir was thereafterwards a party. Section 8 of the Act of January 27, 1933, required probate attorneys, provided for under the Act of May 27, 1908, as amended by the Act of April 12, 1926, to appear and represent any restricted member of the Five Civilized Tribes before the county courts of any county in the State of Oklahoma, or before any appellate court thereof, in any matter in which such restricted Indians may have an interest, and no conveyance of any interest in land of any full-blood Indian heir shall be valid unless approved in open court after notice in accordance with the rules of procedure in probate matters adopted by the Supreme Court of Oklahoma in June of 1914, and said attorneys shall have the right to appeal from the decision of any

county court approving the sale of any interest in land, to the district court of the district to which the county is a part. Clearly showing a settled public policy on the part of the United States Government to protect full-blood or restricted Indian heirs as to restricted allotted lands and restricted funds derived therefrom. A strict construction should not be here had, but one to carry out the purpose of the Congress of the United States whilst providing for the final determination of titles so as to prevent prolonged litigation and trouble, but at the same time vouchsafing that the final determination when the United States Government was brought in as a party should be, at its election, in the proper United States Court. However, it appears to me that the question of the appointment of an administrator is purely a probate matter, and that that rests with the County Court. But the question as to the determination of heirship for the purpose of participating in the restricted funds that are in the possession of the Superintendent for the Five Civilized Tribes, and the restricted allotment located within district, is within the jurisdiction of this court and as to the participation as a restricted heir in the restricted funds, and allotted lands is within the jurisdiction of this court, that that question is properly removed to this court and insofar as that question is involved this court will retain jurisdiction on removal, but the question as to the appointment of the administrator is remanded to the County Court.

(Signed) R. L. WILLIAMS,
Judge.

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No. 411

In the Supreme Court of the United States

October Term, 1945.

THE UNITED STATES OF AMERICA

vs.

JUDGE EUGENE RICE, DISTRICT JUDGE FOR THE EASTERN DISTRICT OF OKLAHOMA.

On Certificate from the United States Circuit Court of Appeals for the Tenth Circuit.

BRIEF of RESPONDENT.

W. T. ANGLIN,
ALFRED STEVENSON,
O. S. HUSER,
Holdenville, Oklahoma,
Attorneys for Judge Eugene Rice, District Judge for the Eastern District of Oklahoma.

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IN THE SUPREME COURT OF THE UNITED STATES.

October Term, 1945.

No. 411

THE UNITED STATES OF AMERICA

vs.

JUDGE EUGENE RICE, DISTRICT JUDGE FOR THE EASTERN DISTRICT OF OKLAHOMA.

BRIEF *of* RESPONDENT.

Statement of Case.

Peter Micco died intestate, May 20, 1942. On that day Howard Cummings filed his petition in the County Court of Okfuskee County, Oklahoma, praying that L. F. Merrell be appointed administrator of the estate of Micco, deceased. On June 4, 1942, the County Court of Okfuskee County, Oklahoma, entered its order appointing L. F. Merrell, E. F. O'Neal, and Perry Chisholm co-administrators of the estate of Micco, deceased.

On June 4, 1942, M. S. Robertson, United States Probate Attorney, pursuant to the provisions of the Act of Congress of April 12, 1926, (44 Stat. 239) caused written notice of the pendency of such probate proceeding to be served upon the Superintendent of the Five Civilized Tribes.

On June 19, 1942, the United States filed its petition for an order of removal under the Act of April 12, 1926. In its petition, the United States alleged that the proceeding

was instituted to obtain the appointment of an administrator for the estate of Micco, deceased, a three-fourths blood Seminole Indian; that a portion of such estate, comprising real and personal property, is restricted under the laws of the United States; that the title to and an interest in restricted land, and the proceeds, rents, income, and profits derived therefrom are involved; that the heirs-at-law of Micco, deceased, are restricted Indians and wards of the United States; and that notice of the pendency of the probate proceeding was served upon the Superintendent of the Five Civilized Tribes, together with a certified copy of all pleadings on file in such cause, on June 4, 1942. An order of removal was issued on July 2, 1942. A transcript of the proceedings was filed in the United States District Court for the Eastern District of Oklahoma, on July 27, 1942.

On August 10, 1942, the three administrators filed their motion to remand the proceedings to the County Court of Okfuskee County, Oklahoma. By agreement of parties this motion was held in abeyance, by the court, until the conflict of jurisdiction between the Okfuskee County Court and the Tulsa County Court was determined. See *Merrell* v. *United States*, 140 F. (2d) 602.

On July 17, 1944, the United States filed its complaint in intervention in which it alleged that Micco, deceased, was duly enrolled as a three-fourths blood Seminole Indian opposite Roll No. 1600 of the approved Seminole Rolls, and, as such, was allotted land in the Seminole Nation, for which patents were duly executed, delivered, and recorded; that Micco, deceased, was a full-blood Indian, being one-fourth Creek and three-fourths Seminole; that the restricted land of Micco, deceased, produced large sums of money, which were held under the supervision of the Secretary of the Interior, pursuant to the regulations prescribed by him; and that Micco died intestate on May 26, 1942, possessed of such restricted lands and funds.

It further alleged:

That no court has legally determined the fact of heirship, and that therefore intervener, is entitled to the judgment and decree of this court determining who are, or were, the heirs of Peter Micco, deceased, and excluding all unknown persons claiming to be heirs of Peter Micco.

> "That on or about November 25, 1942, the said Haney Micco Larney, died, leaving surviving her husband, Ryder Larney, and her minor children, June Larney, Hattie Larney, and Johnnie Lee Larney, all unenrolled Seminole Indians; that the said Haney Micco Larney devised and bequeathed all of her estate in equal parts in said survivors by will, which was executed and approved in all particulars required by law, and has been admitted to probate by the county court having jurisdiction of the settlement of her estate, that subsequent to the death of the said Haney Micco Larney, the said Johnnie Lee Larney died intestate without ever having been married, leaving surviving, his father Ryder Larney, and his two sisters, June Larney and Hattie Larney, heerinabove named; that no decree of heirship has ever been entered by any court to determine the heirs of the said Johnnie Lee Larney, deceased; that in order to determine who are now entitled to receive the estate of Peter Micco, it is necessary and proper that the judgment of this court shall determine whether or not the will of the said Haney Micco Larney transferred her interest to the said devisees and legatees hereinabove named, and, if not, to determine who are her heirs, and also who are the heirs of the said Johnnie Lee Larney, and for such purposes it is proper to proceed against all unknown persons claiming to be heirs of Johnnie Lee Larney, deceased."

It prayed that the court determine the heirs of Micco, deceased, the nature of the property of which Micco died seized, whether restricted or unrestricted, and the specific parts thereof which are restricted and subject to the supervision of the Secretary of the Interior.

On March 6, 1945, the United States District Court for the Eastern District of Oklahoma entered an order dismissing the petition in intervention without prejudice, and ordering that the proceeding be remanded to the County Court of Okfuskee County, Oklahoma.

On April 28, 1945, the United States filed in the Circuit Court of Appeals of the Tenth Circuit its application for leave to file a petition for a writ of mandamus and attached thereto a copy of its proposed petition. The petition prays that a writ of mandamus issue out of that court directed to the Judge of the United States District Court for the Eastern District of Oklahoma commanding him to vacate the judgment entered March 6, 1945, dismissing the complaint in intervention and ordering the proceeding remanded to the County Court of Okfuskee County, Oklahoma.

At the hearing on the application for leave to file the petition for the writ this court sat en banc.

The judges of that court were equally divided on the question of whether the judgment of remand was reviewable by mandamus and on the question of whether the proceeding was removable under the provisions of the Act of April 12, 1926. The case was certified to this court, for it decision, pursuant to 28 U. S. C. 346, by the Circuit Court.

Specification of Points.

1. The judgment of the Federal District Court of the Eastern District of Oklahoma remanding the cause to the County Court of Okfuskee County, Oklahoma, is not reviewable by mandamus.

2. The probate proceedings filed in the County Court of Okfuskee County, Oklahoma, was not removable to the Federal District Court under the provisions of the Act of April 12, 1926.

ARGUMENT.

The Government has another adequate remedy at law, therefore, the judgment of remand is not reviewable by mandamus.

When this case was presented to the Federal District Court for the Eastern District of Oklahoma the Government contended that in this removed action the Federal District Court acquired jurisdiction to decree the heirs of Peter Micco, deceased, determine what property was restricted and what property was unrestricted, and to administer upon the unrestricted property, performing the same functions as the probate court.

In the Circuit Court the Government abandoned its demands that the Federal Court administer upon the estate of said deceased and only the other questions involved were presented. It will be noted that the only questions the Government is now seeking to have decided, in the removed case, are the questions of fact as to who are the heirs of Peter Micco, deceased, and of Johnnie Lee Larney, deceased, and to determine what property passed under the will of Haney Micco Larney, deceased, and to determine their restricted property. As was suggested by Judge RICE, in his opinion, if the Government does not care to litigate these questions in the State Court the Federal District Court is available to it in an original action filed therein for that purpose.

The general rule is that mandamus does not issue where there is another adequate remedy. *Calf Leather Tanner Company* v. *Morganthau*, 80 F. (2d) 536, cert. den. 297 U. S. 715; *Searl* v. *Robertson*, 18 F. (2d) 829, cert. den. 275 U. S. 532; *United States, ex rel. Frey*, v. *Robertson*, 63 F. (2d) 457, cert. den. 298 U. S. 741.

For the general rule of the availability of another remedy, we quote from 34 Amer. Juris. 835:

> "Invented, as it was, for the purpose of supplying defects in justice, mandamus does not supersede legal remedies. To warrant the court in issuing the writ, it must appear that the complaining party has a clear legal right to the performance of the particular duty sought to be enforced and that he has no other plain, adequate, and complete method of redressing the wrong or of obtaining the relief to which he is entitled, so that without the aid of the writ, there would be a failure of justice. According to the practice in most jurisdictions, the writ of mandamus does not issue if any other remedy exists which is fully adequate."

The Act of June 14, 1918, making the County Court of Oklahoma a federal agent for the purpose of determining the question of fact as to who are the heirs of a deceased citizen of the Five Civilized Tribes of Indians, contained the following provision:

> "Provided that an appeal may be taken in the manner and to the court provided by law in cases of appeals in probate matters generally."

Evidently Congress had in mind that in cases where restricted Indians were involved they would be represented by the United States Probate Attorney, or other representatives, and that they would have a right by successive appeals to have the judgment reviewed by the Supreme Court of the United States. In the case of *United States v. Fixico*, 115 F. (2d) 389, in an opinion written by Judge BRATTON, page 393, the court used the following language:

> "• • • The United States expresses concern that if the orders are not re-examined and vacated, it will not have any opportunity to be heard in the litigation in its capacity as guardian of these Indian wards, and that it will be bound by the judgments of the state courts. We entertain no doubt that the United States

can now appear in the state courts, appropriately litigate all issues and by the process of successive appeals, present the federal questions involved to the Supreme Court of the United States."

It is no longer an open question that this method of review is available to the Government.

In addition to the above remedy, the Government may file a suit in the Federal District Court of the Eastern District of Oklahoma to quiet title and decree heirs and determine the restricted property. Judge RICE calls attention to this procedure in his opinion in the *Micco* case. For a review of these authorities, see the case of *McCarty* v. *Hollis*, 120 F. (2d) 540. We quote from the opinion:

"The United States, in its own behalf and in its capacity as guardian of Indian tribes or individual Indians, may institute and maintain in the federal courts appropriate suits for the enforcement of the rights or the protection of the property of its Indian wards. *Heckman* v. *United States*, 224 U. S. 413, 32 S. Ct. 424, 56 L. ed. 820; *United States* v. *Noble*, 237 U. S. 74, 35 S. Ct. 532, 59 L. ed. 844; *United States* v. *Osage County*, 251 U. S. 128, 40 S. Ct. 100, 64 L. ed. 184; *La Motte* v. *United States*, 254 U. S. 570, 41 S. Ct. 204, 65 L. ed. 410; *Creamer* v. *United States*, 261 U. S. 219, 43 S. Ct. 342, 67 L. ed. 622; *United States* v. *Minnesota*, 270 U. S. 181, 46 S. Ct. 298, 70 L. ed. 539; *Mars* v. *McDougal*, 10 Cir., 40 F. (2d) 247, certiorari denied 282 U. S. 850, 51 S. Ct. 28, 75 L. ed. 753; *Tiger* v. *Twin State Oil Co.*, 10 Cir., 48 F. (2d) 509. The right to maintain such suits is the necessary complement to the obligations of guardianship which the United States bears towards its wards. *Heckman* v. *United States*, *supra*; *La Motte* v. *United States*, *supra*. The jurisdiction of a United States Court to entertain such a suit finds its source in Section 2 of Article III of the Constitution of the United States which provides that the judicial power of the United States shall extend to all controversies to which the United States is a party. *Barnett* v. *United States*, 9

Cir., 82 F. (2d) 765, certiorari denied 299 U. S. 546, 57 S. Ct. 9, 81 L. ed 402."

Nor will the fact that there is an administration pending in the County Court of Okfuskee County, Oklahoma, prevent the Government from filing an original action in the Federal District Court of the Eastern District of Oklahoma for the same relief sought in its petition of intervention filed in the removed case. See *McDougal, et al.*, v. *Black Panther Oil & Gas Company, et al.*, 273 Fed. 113; *Marsh* v. *Peters, supra; Wells* v. *Helms, et al.*, 105 F. (2d) 402; *Roberts* v. *Anderson, et al.*, 66 F. (2d) 874; *United States* v. *Anglin & Stevenson, et al.*, 145 F. (2d) 622.

An appeal or writ of error does not lie to review an order of remand, for the reason that such an order is not a final judgment or decree.

This same question was presented to the Circuit Court of Appeals in the case of *United States* v. *Fixico, et al.*, 115 F. (2d) 389. That case was originally filed in the State District Court and removed to the Federal District Court of the Eastern District of Oklahoma, under the act of April 12, 1926. Thereafter, the plaintiff filed a motion to remand the case to the State District Court which motion was by the Federal District Judge sustained and the government appealed to the Circuit Court of Appeals, and at the same time filed an application for writ of mandamus to compel the Federal District Court to recall its order of remand, and retain jurisdiction of the case.

In an opinion by Judge BRATTON, the Circuit Court denied the writ and dismissed the appeal. Because of the similarity of the questions involved, and the numerous authorities cited by the court supporting its conclusions, we quote extensively from the opinion:

"Prior to the enactment of the Judiciary Act of

March 3, 1875, 18 Stat. 470, an appeal or writ of error did not lie to review an order of remand for the reason that such an order was not a final judgment or decree. *Knickenbocker Ins. Co.* v. *Comstock*, 16 Wall. 258, 21 L. ed. 493; *Chicago & A. R. Co.* v. *Wiswall*, 23 Wall. 507, 23 L. ed. 103. But Section 5 of the Act of 1875, *supra*, expressly authorized review of such an order on writ of error or appeal, as the case might be. That provision continued in force only two years. Section 2 of the Act of March 3, 1887, 24 Stat. 552, provided that an order of remand should be immediately carried into execution, and that no appeal or writ of error should be allowed; *and Section 6 expressly repealed that part of Section 5 of the Act of 1875, authorizing review.* As corrected by the Act of August 13, 1888, 25 Stat. 433, and as amended by the Act of March 3, 1911, 36 Stat. 1087, 1094, the provision interdicting the review of an order of remand by appeal or writ of error is a part of Section 28 of the Judicial Code, as amended, 28 U. S. C. A., §71. While the textual language of the statute merely denied review by appeal or writ of error, and does not mention writs of mandamus, it is no longer open to doubt that an order remanding a case which was removed from a state court under the general removal statute cannot be re-examined in this court on appeal, by mandamus, or otherwise. *Morey* v. *Lockhart*, 123 U. S. 56, 8 S. Ct. 65, 31 L. ed. 68; *In re Pennsylvania Co.*, 137 U. S. 451, 11 S. Ct. 141, 34 L. ed. 738; *McLaughlin Bros.* v. *Hollowell*, 228 U. S. 278, 33 S. Ct. 465, 57 L. ed. 835; *Yankaus* v. *Feltenstein*, 244 U. S. 127, 37 S. Ct. 567, 61 L. ed. 1036; *In re Matthew Addy S. S. Co.*, 256 U. S. 417, 41 S. Ct. 508, 65 L. ed. 1027; *Employers Reinsurance Corporation* v. *Bryant*, 299 U. S. 374, 57 S. Ct. 273, 81 L. ed. 289; *Traveler's Protective Ass'n* v. *Smith*, 4 Cir., 71 F. (2d) 511; *In re Satterley*, 5 Cir., 102 Fed. (2d) 144, *certiorari* denied *Jones* v. *Page*, 308 U. S. 562, 60 S. Ct. 93, 84 L. ed. 472.

"It is urged however that Section 3 is silent in respect to the re-examination of an order of remand; that the inhibition against re-examination contained in the general removal statute has no application; and

that in the absence of a forbidding statute, the orders may be re-examined, either on appeal or by mandamus. In respect to the removal of a case coming within its scope, Section 3 is complete, independent, and distinct from the general removal statute. *McKay* v. *Rogers*, 10 Cir., 82 F. (2d) 795. But it is silent respecting the remand of a case removed under its provisions, or the re-examination of an order of remand. It must be presumed that the Congress, in the enactment of the statute in that manner, was cognizant of the long-established general rule that an order of remand in a case removed under the general removal statute could not be re-examined in any form. And it is the well-recognized rule that a special or isolated enactment of this kind must be read in the light of the existing law relating to the subject. A new statute of a fragmentary nature must be construed as intended to fit harmoniously into the existing system, unless a contrary legislative purpose is plainly indicated. *United States* v. *Barnes*, 222 U. S. 513, 32 S. Ct. 117, 56 L. ed. 291; *United States* v. *Sweet*, 245 U. S. 563, 38 S. Ct. 193, 62 L. ed. 473; *Panama R. R. Co.* v. *Johnson*, 264 U. S. 375, 44 S. Ct. 391, 68 L. ed. 748; *United States* v. *Jefferson Electric Co.*, 291 U. S. 386, 54 S. Ct. 443, 78 L. ed. 859; *Gay* v. *Ruff*, 292 U. S. 25, 54 S. Ct. 608, 78 L. ed. 1099, 92 A. L. R. 970. Nothing appears in the language of this statute, in the reports of Congressional Committees, or otherwise, which indicates a legislative intent to depart from the general rule that an order of remand is not subject to review or re-examination, either by appeal or mandamus. And in the absence of such an indication, the statute should be construed to fit harmoniously into the general system on the subject. Compare, *Cole* v. *Garland*, 7 Cir., 107 F. 759. For the reasons indicated, the orders of remand are not open to re-examination in this court on appeal or by mandamus."

In the case of *Mutual Life Insurance Co. of New York* v. *Holly, Judge, et al.*, (C. C. A. 7th) 135 F. (2d) 675, the court in announcing this same rule used the following language in the opinion:

"We think for another reason we have no jurisdiction to issue a writ of mandamus or injunction in this cause. It is admitted by counsel for the insurance company that it is without remedy by way of appeal to this court. That is an admission that this court has no jurisdiction. Our jurisdiction is wholly appellate, and if there is no appeal pending here and can be no appeal, we are wholly without authority to issue a writ of mandamus or injunction, as we have no such original jurisdiction. Our jurisdiction to issue such writs is only incidental to and in aid of our appellate jurisdiction. 28 U. S. C. A., § 377; *United States* v. *Mayer*, 235 U. S. 55, 35 S. Ct. 16, 59 L. ed. 129; *United States* v. *Avis*, 3 Cir., 108 F. (2d) 457. Since there is no proceeding of any kind which invokes or may invoke our appellate jurisdiction in aid of which the writs herein prayed for are sought, we are wholly without jurisdiction to issue them."

The same rule was announced in the following cases: *In re Application of the Hardware Mutual Fire Ins. Co.*, (Minn.) 91 F. (2d) 13; *Wabash Ry. Co.* v. *Woodrough, District Judge, et al.*, 29 F. (2d) 832.

In *Moulding-Brownell Corporation* v. *Sullivan*, 92 F. (2d) 646, certiorari denied 303 U. S. 638, in the third paragraph of the syllabus the court announced the following rule:

"In statutes prescribing procedure for removal of cause from state court to Federal District Court and prohibiting review of District Court's decision remanding cause to state court, Congress intended to prohibit review of such decision not only by appeal or writ of error but by mandamus as well, irrespective of whether cause was remanded on jurisdictional or procedural grounds (Jud. Code, Secs. 28, 29, 28 U. S. C. A., Secs. 71, 72)."

In *Employers Reinsurance Corporation* v. *Bryant*, 81 L. ed. 289, this court, speaking through Justice VAN DEVANTER, used the following language:

"A leading case on the subject is *Re Pennsylvania Co.*, 138 U. S. 451, 34 L. ed. 738, 11 S. Ct. 141, which dealt with a petition for mandamus requiring the judges of a Circuit Court, to reinstate, try and adjudicate a suit which they, in the Circuit Court, had remanded to the state court whence it had been removed. After referring to the earlier statutes and practice and coming to the Act of March 3, 1887, this court said (p. 454):

> 'In terms, it only abolishes appeals and writs of error, it is true, and does not mention writs of mandamus; and it is unquestionably a general rule, that the abrogation of one remedy does not affect another. But in this case we think it was the intention of Congress to make the judgment of the Circuit Court remanding a cause to the state court final and conclusive. The general object of the act is to contract the jurisdiction of the Federal Courts. The abrogation of the writ of error and appeal would have had little effect in putting an end to the question of removal, if the writ of mandamus could still have been sued out in this court. It is true that the general supervisory power of this court over inferior jurisdictions is of great moment in a public point of view, and should not, upon light grounds, be deemed to be taken away in any case. Still, although the writ of mandamus is not mentioned in the section, yet the use of the words "such remand shall be immediately carried into execution," in addition to the prohibition of appeal and writ of error, is strongly indicative of an intent to suppress further prolongation of the controversy by whatever process. We are, therefore, of opinion that the act has the effect of taking away the remedy by mandamus as well as that of appeal and writ of error.'

"The provisions in the Act of 1887 on which that decision and others to the same effect were based are still in force as parts of Secs. 71 and 80, 28 U. S. C. A. They are *in pari materia*, are to be construed accordingly rather than as distinct enactments, and when so construed, show as was held in *Morey* v. *Lockhart*, 123

U. S. 56, 58, 31 L. ed. 68, 69, 8 S. Ct. 65, that they are intended to reach and include all cases removed from a state court into a Federal Court and remanded by the latter."

In *Frank L. Kloeb, Judge*, v. *Armour & Company*, 85 L. ed. 124, this court held that a Federal District Court in determining whether a cause removed to it should be remanded to the state court, under the statute requiring the remand of cases improperly removed to the Federal Court, was not bound by a prior decision of the highest court of the state, in the same cause, holding the cause to be removable to the Federal Court and the order of the Federal Court remanding the cause was not, on that ground, reviewable by the Circuit Court of Appeals on mandamus.

The Government now contends in substance that the ban on review contained in the 1887 Act does not apply to the United States on the principle that the Government is not to be deprived of a prerogative, right, or interest by the general terms of a statute which does not expressly include the United States.

We are familiar with the rule which the Government has in mind, and the cases cited in relation thereto, but we submit that the rule mentioned is without application here, and is only applied where the meaning of a statute is vague or doubtful, which we submit is not the case here.

Title 28, Section 71, the statute in question, is very plain. We quote from what we consider the pertinent part as follows:

"Whenever *any cause* shall be removed from any state court into any District Court of the United States, and the District Court shall decide that the cause was improperly removed, and order the same to be remanded to the state court from whence it came, such remand shall be immediately carried into execution, and no appeal or writ of error from the decision of the

District Court so remanding such cause shall be allowed."

The plain and unequivocal language of this portion of the statute fortified by the long unbroken line of decisions of all the Federal Courts, over a period of sixty years, consistently holding that an order of removal is not reviewable either by appeal or mandamus leaves no room for speculation or doubt as to the purpose for which this statute was enacted.

In the case of *United States* v. *California*, 297 U. S. 175, 80 L. ed. 567, this court held, in paragraph 6 of the syllabus as follows:

> "The presumption that a sovereign is not intended to be bound by its own statute, unless named in it, is an aid to construction when the purpose of the statute is in doubt, but does not require that the aim of a statute fairly to be inferred be disregarded because not explicitly stated."

We also quote from the opinion of the court delivered by Mr. Justice STONE, reading as follows:

> "Respondent invokes the canon of construction that a sovereign is presumptively not intended to be bound by its own statute unless named in it, see *Guaranty Title & T. Co.* v. *Title Guaranty & S. Co.*, 234 U. S. 152, 56 L. ed. 706, 32 S. Ct. 457, 27 Am. Bankr. Rep. 873; *United States* v. *Herron*, 20 Wall. 251, 22 L. ed. 275; *Re Fowble*, (D. C.) 213 F. 676. This rule has its historical basis in the English doctrine that the Crown is unaffected by acts of Parliament not specifically directed against it. *United States* v. *Herron*, *supra* (20 Wall. 255, 22 L. ed. 276); *Dollar Sav. Bank* v. *United States*, 19 Wall. 227, 239, 22 L. ed. 80, 82. The presumption is an aid to consistent construction of statutes of the enacting sovereign when their purpose is in doubt, but it does not require that the aim of a statute fairly to be inferred be disregarded because not explicitly stated."

This case was presented to the District Court and after careful consideration in an able opinion he decided the issues as he understood the law to be. The Government is seeking in this case to compel that court to decide the issues in a different way. This court in the case of *Interstate Commerce Commission* v. *United States*, 289 U. S. 386, 77 L. ed. 1274, in the 8th paragraph of the syllabus announced the following rule:

> "Mandamus will not issue to compel a judicial officer to act in a particular way."

The proceedings instituted in the County Court of Okfuskee County to probate the unrestricted estate of Peter Micco, deceased, was not removable under the provisions of the Act of April 12, 1926.

STATUTES INVOLVED.

Section 1 of the Act of June 14, 1918, 40 Stat. 606:

> Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled. That a determination of the question of fact as to who are the heirs of any deceased citizen allottee of the Five Civilized Tribes of Indians who may die or may have heretofore died, leaving restricted heirs, by the probate court of the State of Oklahoma, having jurisdiction to settle the estate of said deceased, conducted in the manner provided by the laws of said state for the determination of heirship in closing up the estates of deceased persons, shall be conclusive of said question: *Provided*, that an appeal may be taken in the manner and to the court provided by law, in cases of appeal in probate matters generally.

Section 3 of the Act of April 12, 1926, 44 Stat. 239:

> Any one or more of the parties to a suit in the United States courts in the State of Oklahoma or in the state courts of Oklahoma, to which a restricted member of the Five Civilized Tribes in Oklahoma, or the restricted heirs or grantees of such Indian are parties,

as plaintiff, defendant, or intervener, and claiming or entitled to claim title to or an interest in lands allotted to a citizen of the Five Civilized Tribes or the proceeds, issues, rents, and profits derived from the same, may serve written notice of the pendency of such suit upon the Superintendent for the Five Civilized Tribes, and the United States may appear in said cause within twenty days thereafter, or within such extended time as the trial court in its discretion may permit, and after such appearance or the expiration of said twenty days or any extension thereof the proceedings and judgment in said cause shall bind the United States and the parties thereto to the same extent as though no Indian land or question were involved.

Judge RICE in his opinion, because of the importance of the questions involved, reviewed the decisions of both the State and Federal Courts, as well as the history of the Congressional Acts involved herein. His opinion is thorough, exhaustive, and we think clearly sets out the correct rule of law applicable to the questions in the case. For that reason, we incorporate herein as a part of our brief his opinion:

THE OPINION.

MEMORANDUM.

"This proceeding originated in the County Court of Okfuskee County, Oklahoma, by the filing of a petition for the appointment of an administrator of the estate of Peter Micco, deceased. The petition discloses that the deceased left an estate of the approximate value of $500,000.00, and that his heirs are full-blood Indians.

"Removal to this court was upon petition filed by the United States Government, pursuant to a notice caused to be served upon the Superintendent of the Five Civilized Tribes by the United States Probate Attorney, acting in his official capacity, and for alleged incompetent minor heirs of the deceased. The petition for removal filed by the United States discloses that

the deceased was enrolled as the 3/4ths blood Seminole Indian and that a portion of the estate of said deceased is restricted property under the laws of the United States, and that the heirs at law of said Peter Micco are restricted Indians. The basis of the notice caused to be served by the United States Probate Attorney was a motion to dismiss filed in the County Court of Okfuskee County, Oklahoma, challenging the jurisdiction of the County Court to appoint an administrator for two reasons: *First*, Micco was not a resident of Okfuskee County at the time of his death; and *second*, the petitioner was not authorized to file the petition, being neither a relative of the deceased nor a creditor of his estate.[1]

"Before removal here, the County Court appointed co-administrators who filed their bonds and qualified as such. After the decision in *Merrell* v. *United States*, 140 F. (2d) 602, the government abandoned any contest as to the jurisdiction of the County Court to appoint an administrator and filed herein its complaint in intervention, seeking the judgment of this court determining the heirs of the deceased. In addition, the government alleges that since the death of Peter Micco, one of his heirs, Haney Micco Larney, has died leaving a will which has been admitted to probate by the County Court having jurisdiction of the settlement of her estate, and that since the death of Haney Micco Larney, one of her heirs, to-wit, Johnnie Lee Larney, has died intestate. On these allegations the court is asked to determine whether or not the will of said Haney Micco Larney, transferred her interest in the estate of Peter Micco, deceased, to the devisee and legatees named therein, and if not, to determine the heirs of the said Haney Micco Larney and also the heirs of Johnnie Lee Larney, the ulitmate relief sought by the government being a determination of who are now the rightful owners of the property left by Peter Micco, deceased, what

1. For a discussion of the facts in regard to the conflict as to the place of residence of the deceased during his lifetime, and at the time of his death, see Micco, Guardian, v. Huser, 185 Okl. 394, and Merrell v. United States, 140 F. (2d) 602.

interest each takes, and a further decree determining which properties of the deceased are restricted and subject to the supervision of the Secretary of the Interior.

"A probate proceeding—nothing more—was removed. Equitable relief which might appropriately be granted in an original action filed herein by the United States government is now sought. The question is—does this court have jurisdiction to proceed and determine in this removed proceeding the issues presented in the government's complaint in intervention? Stated another way—is a probate proceeding removable under Section 3 of the Act of April 12, 1926 (44 Stat. 239)[2]?

"The jurisdiction of this Court has been challenged by motion to remand filed herein by the administrators appointed by the County Court. For the first time, the government has definitely taken the position that this court has probate jurisdiction in their Indian cases. At the request of this court the government filed its brief herein stating clearly and definitely its position. Its position, as stated in its brief, is:

> '*1.* Whether proceedings for the probate of the estate of a deceased, restricted Indian allottee of the Five Civilized Tribes who is survived by restricted Indian heirs are removable to the Federal Court under Sec. 3 of the Act of April 12, 1926, 44 Stat. 239.
>
> '*2.* Whether, if such proceedings are removable, the Federal Court may exercise complete probate jurisdiction *and fully administer the unrestricted estate.*' (Emphasis supplied.)

"Admittedly, the question presented is not without difficulty. The difficulty is presented by the fact that this jurisdiction is committed to the conclusion that a contest over the probate of a will devising restricted property of a deceased restricted member of the Five Civilized Tribes is removable. *Caesar v. Burgess*, 103 F. (2d) 503. On the other hand, the courts of

2. Hereinafter referred to as the Act of 1926.

this jurisdiction are committed to the conclusion that this court does not have general probate jurisdiction nor are probate proceedings removable under the general removal statutes. *Caesar* v. *Burgess, supra; House* v. *United States*, 144 F. (2d) 555 (a removed case).

"In the *Jackson Barnett* case, *Scott* v. *Beams, et al.*, and four other cases, 122 F. (2d) 777, the right of the government to remove a probate proceedings from the County Court was not discussed. That case was a consolidation of a proceeding removed from the County Court of Muskogee County, Oklahoma, with two quiet title suits, one removed from the State District Court of Muskogee County, and the other removed from the State District Court of McIntosh County, seeking a determination of the heirs of Jackson Barnett. After removal, the probate proceeding was consolidated with the two quiet title suits. Thereafter, Judge WILLIAMS entered an order retaining jurisdiction in the probate proceedings for the sole purpose of determining heirs, and remanded such proceedings for the appointment of an administrator and further proceedings by the administrator. The procedure followed by Judge WILLIAMS in the *Jackson Barnett* case was the same as he had followed in *Caesar* v. *Burgess, supra*, wherein he retained jurisdiction solely for the purpose of determining the contest of the will, and in an earlier case of *In re Palmer's Will*, 11 F. Supp. 301. It is interesting to note that the *Palmer's Will* case, the first of its kind to be removed, was not removed until after trial in the County Court and while pending on appeal in the District Court. The government has recently taken the position in this court, that an attempted removal after appeal is ineffective, and this court does not acquire jurisdiction.

"After the decision in *Scott* v. *Beams*, came the decision of the Supreme Court of the United States in *United States* v. *Hellard*, 322 U. S. 363, which will be discussed later on in this memorandum.

"If this court has the jurisdiction contended for by the Government, it is by virtue of Section 3 of the

Act of 1926. Said section refers to 'parties to a suit' as 'plaintiff, defendant, or intervener.' It provides that the United States 'may appear in said cause within twenty days 'after service of notice.' Twenty days is the time provided by the laws of Oklahoma for a defendant in a civil suit in the District Courts to answer. The history of this legislation shows that an effort was made to change the time within which the Government should appear from twenty days to sixty days. Objection was made to this change for the reason that it was not deemed wise to attempt to change the procedure of the State Courts of Oklahoma. Obviously, the members of Congress were not thinking of the probate procedure of the County Courts of Oklahoma. See Congressional Record, Vol. 67, part 6, pages 6517 and 6573. In order to conform to state procedure and still have additional time, it was provided that 'the trial court' (meaning state court) may extend the time within which the United States may appear. When such a suit is removed, the act provides: 'and the cause shall then proceed in the same manner as if it had been originally commenced in said District Court.'

"A careful reading of Section 3, accepting the language as the terms therein are ordinarily understood, does not suggest a probate proceeding. Conceding, for the moment, that the term 'suit' as used in the act, in its broadest interpretation and meaining, includes a probate proceeding, the fact remains that such is not its ordinary and accepted meaning, and we should presume Congress used it in its ordinary and accepted meaning. If Section 3 is to be construed as the government contends for, it confers upon the United States District Courts of the eastern half of Oklahoma jurisdiction in a vast field of law and a jurisdiction which does not exist by the general act of Congress. One would presume that had Congress intended to make such a sweeping change in the jurisdiction of the United States District Courts of this jurisdiction, apt language to that effect would have been used, leaving the matter free from doubt. If it had been the purpose of Congress to thus enlarge the jurisdiction of

the courts in so far as restricted members of the Five Civilized Tribes are concerned, it is difficult to understand why the Department of the Interior, immediately upon the passage of the act, and the Department of Justice did not so understand it. The intent of Congress should have been better known then than it is now, nineteen years after the passage of the act.

"The Act of 1926 was passed for the purpose of affording relief in so far as the permanence of Indian titles in the eastern part of Oklahoma is concerned. It has been said 'such act is a remedial statute for permanence of titles, and that judgments in all such actions should be binding on all parties.' *United States* v. *Thompson*, 128 F. (2d) 172.

"In *Board of County Commissioners of Tulsa County* v. *United States*, 94 F. (2d) 450, Section 2 of the act was under consideration. Therein Judge BRATTON, speaking for the court, stated:

> 'The suit above described must be one claiming "title to or an interest in lands allotted to a citizen of the Five Civilized Tribes or the proceeds, rents and profits derived from the same".'

"The decision in *Caesar* v. *Burgess*, *supra*, was based upon the proposition that title to real estate was involved. Therein, Judge BRATTON, said:

> 'The Supreme Court of the State (Oklahoma) has held repeatedly that a contested proceeding for the probate of a will is a special proceeding in the nature of an equitable action.'

"Emphasis was placed upon the fact that a valid will operates as an alienation within the meaning of Congressional enactments. The conclusion is inescapable that the language in *Caesar* v. *Burgess* was carefully chosen for the purpose of restricting the decision to the narrow question involved, to-wit, a contest of the probate of a will, and the basis for the decision is that it is in the nature of an equitable proceeding affecting title to real estate and involving alienation of real property. The decision of the Circuit Court in each instance wherein the right of removal is discussed is

based upon the fact that title to land, or issues, rents and profits therefrom, was involved.[3]

"This is in keeping with the legislative history of this legislation. In the Report of the Committee on Indian Affairs submitted by Mr. Hastings, Congressman from Oklahoma, he made this statement:

> 'This bill was introduced in the later part of the last session of the Sixty-eighth Congress and extended hearings were held on it, but no report was made, and the same was reintroduced in the present session of Congress. It contains three sections.
>
> 'The first section amends Section 9 of the Act of May 27, 1908, and deals with the approval of conveyances made by full-blood heirs of deceased allottees of the Five Civilized Tribes. It is for the purpose of stabilizing titles and will be of benefit to all land owners in eastern Oklahoma, Indian and white, in that the title of lands of deceased allottees may be made more definite and certain, and there will be less difficulty with reference to same.
>
> 'Section 2 extends the statute of limitations to the restricted Indians of the Five Civilized Tribes. It does not affect any pending lawsuit, and it gives two years additional time in the event the statute of limitations is about to run within which to institute any suit wherein the interests of a restricted Indian of the Five Civilized Tribes is involved.
>
> 'Section 3 provides only where the interest of a restricted Indian of the Five Civilized Tribes is being litigated in the State Courts that service may be had upon the Government, and the Government is given the right to choose the forum in which the suit may be tried and may transfer such case to

3. Hosey, et al., v. Kennamer, et al., 21 F. (2d) 64; Fish, et al., v. Kennamer, 37 F. (2d) 253; United States, et al., v. Mid-Continent Petroleum Ass'n, 67 F. (2d) 37; McKay v. Rogers, 82 F. (2d) 795; Whitechurch v. Crawford, 92 F. (2d) 249; Caesar v. Burgess, 103 F. (2d) 503; United States v. Fixico, et al., 129 F. (2d) 389.

the United States District Court upon motion in the event that the Government chooses to do so. If said case is not transferred the decision of the court is final, and it would prevent a new suit from being instituted for and on behalf of a restricted Indian thereafter by the Government. The entire bill is designed to stabilize titles in eastern Oklahoma and it is expected that it will add value to these lands. The bill has the approval of the Secretary of the Interior, as evidenced by the report which is attached hereto and made a part of this report.'

"It will be noted that Congressman Hastings who was a lawyer, used the terms 'suit' and 'case' interchangeably, and referred to the fact that the government would be prevented from instituting a new 'suit.' The 'new suit' mentioned by the Congressman could not possibly be a probate proceeding because no one contends that the government may institute a probate proceeding. The 'extended hearings' mentioned by Congressman Hastings discloses that no mention was ever made concerning a probate proceeding. I have carefully read the hearing before the subcommittee of the Committee on Indian Affairs, House of Representatives, Sixty-eighth Congress, Second Session, printed and published by the Government Printing Office, dated January 6, 1925. A probate proceeding is nowhere mentioned. Seven attorneys from Oklahoma appeared before this subcommittee to present to the committee the necessity and purpose for such legislation. Briefly stated, the necessity was due to the fact that no statute of limitations was applicable to restricted Indians under the decisions of the court, and a judgment against an Indian, involving restricted lands, was not binding upon either him or the United States Government, the result being that there was no such thing as a good title derived from a restricted Indian. The other involved the uncertainty as to the proper County Court for the approval of a deed by a full-blood Indian heir. The Hon. James B. Diggs, of

Tulsa, Oklahoma, made an extended statement before the committee, in which he said:

> 'Our court has held that the statute of limitations does not apply to any Indian until 15 years from the removal of his restrictions. * * * Another condition that exists there (in Oklahoma) is this: An Indian may sue you on a question of title. If he recovers the judgment is good against you as claimant and he gets the land, but if the Indian fails in that suit the Indian nor his heirs are not bound. So the condition exists in Oklahoma that the Indian can sue you and you can win. The Indian can appeal that case from the lower court to the Supreme Court of Oklahoma and you win. The case may then be appealed from the Supreme Court of Oklahoma to the United States Supreme Court and you win again and yet your title is not acquired. * * * After you have done all this, Mr. Indian or his heirs can turn around and sue you again, and you go through the same process to the United States Supreme Court and still your title is not good, though you have won, and then on top of all that the United States can bring a suit retrying identically the same question.'

"The statement of the Honorable C. B. Ames, General Counsel for the Texas Company, and formerly Solicitor General of the United States, was substantially to the same effect. None of the gentlemen from Oklahoma made any complaint concerning the remedy provided by the Act of June 14, 1918 (40 Stat. 606).[4]

"The contention is now made that in a probate proceeding the probate court may determine the heirs of a decedent and therefore title to real estate is involved.

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4. Section 1 of said Act provides in part as follows: "that a determination of the question of fact as to who are the heirs of any deceased citizen allottee of the Five Civilized Tribes of Indians who may die or may have heretofore died, leaving restricted heirs, by the Probate Court of the State of Oklahoma having jurisdiction to settle the estate of said deceased, conducted in the manner provided by the laws of said state for the determination of heirship in closing up the estate of deceased persons, *shall be conclusive of said question.*" (Emphasis supplied.)

No court has ever said so. The authority of the County Courts of Oklahoma to determine the question of fact of who are the heirs of a deceased allottee of the Five Civilized Tribes leaving restricted heirs is found in the Act of Congress approved June 14, 1918, *supra*. It is to be presumed that Congress, in passing the Act of June 14, 1918, and the Act of May 12, 1926, were aware of a limitation upon the jurisdiction of the probate courts or County Courts of Oklahoma, as follows: 'Provided that the County Court shall not have any jurisdiction in any action * * *or in any matter wherein the title or boundaries of land may be in dispute or called in question.' Sec. 12, Art. 7, Constitution of Oklahoma.

"The statutes of Oklahoma provide that in a probate proceeding incident to the final settlement of the accounts of an administrator and the distribution of the funds remaining, the court may determine the heirs of the decedent. Prior to the passage of the Act of 1918 the authority for such a determination was found in Sections 6463, 6464, 6466 and 6488, Revised Laws 1910. After the passage of the Act of 1918, and in the year 1919, the Oklahoma Legislature passed an act designed to enable the Oklahoma courts to comply in every particular with the express wish of Congress as contained in the Act of 1918. 84 O. S. A. 251, *et seq.* Cf. *Hardridge* v. *Hardridge*, 168 Okl. 7; *Heatherington* v. *Foster*, 173 Okl. 440; *Gassin* v. *McJunkin*, 173 Okl. 210. It has never been considered in Oklahoma that this provision for the determination of heirs incident to the settlement of an estate is violative of the Constitutional provision, *supra*.

"The courts of Oklahoma recognize the plenary authority of Congress to legislate for full-blood members of the Five Civilized Tribes concerning their restricted lands, and in construing the authority of the County Courts under the Act of 1918, have scrupulously recognized that power. *State, ex rel. Miller*, v. *Huser*, (Okfuskee County Judge) 72 Okl. 130. No effort is made to apply said act where all the heirs are unrestricted. *Moore* v. *Jefferson*, 190 Okl. 67. In order to

enter a valid decree of heirship in a probate proceedings under said act, the court must acquire jurisdiction of unrestricted assets. *Moore* v. *Jefferson, supra; Hardridge* v. *Hardridge, supra.* Probate courts of Oklahoma do not assert jurisdiction over restricted property of Indians. *Cowokochee* v. *Chapman*, 90 Okl. 121; *Rayburn* v. *Carney*, 170 Okl. 255; *Barnard* v. *Bilby*, 68 Okl. 63. In a probate proceeding under the Act of 1918, the court does not try title to land. *In re Jackson's Estate*, 117 Okl. 151; *Arnold* v. *Willis*, 105 Okl. 172. An owner of an interest in land purchased prior to the date of the passage of the Act of 1918 is not brought into nor bound by probate proceedings instituted thereunder. *Homer* v. *Lester*, 95 Okl. 284. In probate probate proceedings under said Act of Congress the County Courts of Oklahoma act as an administrative agency of the United States Government to determine the question of fact as to who are the restricted Indian heirs of a deceased citizen allottee of the Five Civilized Tribes of Indians. *State, ex rel. Miller*, v. *Huser, supra*, wherein the court said: 'The words "the question of fact" were employed by Congress to make clear its purpose that the agencies designated were to exercise administrative functions as distinguished from strictly judicial functions.' The court in *State, ex rel. Miller*, v. *Huser*, did not find it necessary to determine whether or not said act conflicted with the constitutional provision limiting the jurisdicton of probate courts in Oklahoma, nor whether title to real estate is involved. In the opinion the court compares the finding of fact of heirship made by the County Court as similar to the action of Congress in making the approved rolls conclusive as to the quantum of blood of an enrolled Indian. The opinion of the Supreme Court in the *Huser* case was referred to in *McDougal, et al.*, v. *Black Panther Oil and Gas Co., et al.*, 273 F. 113, as 'exhaustive, instructive, and convincing.' The Federal Courts have concurred with the opinion in the *Huser* case as to the nature of the proceedings had in the County Court.

"'The County Court in such capacity, is in effect

a Federal agency acting with the same result as if it was done by the Superintendent of the Five Civilized Tribes, the Commissioners of the Land Office, or the Secretary of the Interior.' *In re Jessie's Heirs*, 259 F. 694.

"Cf. *Barnett* v. *Kunkel, et al.*, 259 F. 394; *Marcy* v. *Board of County Commissioners*, 45 Okl. 1; *Knight, et al.*, v. *Carter Oil Co.*, 411 Okl. 300.

"Congress has never, in my opinion, intentionally enacted any legislation requiring the United States District Court, or any other Federal Court, to act in an administrative capacity. To contend that by the language of Section 3 of the Act of 1926 Congress intended to substitute the United States District Courts in eastern Oklahoma for the County Courts in Oklahoma in performing an administrative act and becoming an instrumentality of the Federal Government in an administratvie capacity is difficult to believe, and it is still more difficult to believe that Congress intended that in the conversion of the United States District Court from a court into an administrative agency it would thereby convert the United States District Court into a probate court.

"County Courts of Oklahoma since the Act of Congress of 1908, (35 Stat. 312) have been authorized to approve deeds of full-blood Indian heirs to inherited lands. In so doing they act as a Federal agency in an administrative capacity. So far, no one has assumed that such a proceeding may be removed to the Federal Court under Section 3 of the Act of 1926.

"It is doubtful if title to land is involved in the determination of heirship under the Act of 1918. *State, ex rel. Miller*, v. *Huser, supra.* The first instance in which the government contended that title to land was involved in the proceeding for the determination of heirs had in the County Court was in *Roberts* v. *Anderson; et al.*, 66 F. (2d) 874, 879. The contention was first made on appeal. The decision on appeal did not turn upon such contention. Judge McDermott, however, in the opinion commented upon this situation as follows;

'The act (Act of 1926) does not clearly refer to heirship proceedings in the probate court; nor are probate proceedings ordinarily removable; an heirship proceeding may indirectly affect the title to lands, or it may not. The point is not necessary to a disposition of the cause, and Congress may clear up any uncertainty that exists before it again arises. We therefore leave it as we find it.'

"Congress has not taken any steps to clear up the situation which Judge McDERMOTT mentioned. A decree of heirship does not operate directly or indirectly to transfer lands. Title to inherited lands vests by operation of law in the heirs of the deceased at the moment of his death. The contention advanced in *Roberts* v. *Anderson, supra,* apparently was abandoned in *United States* v. *Hellard,* 322 U. S. 363, wherein the Supreme Court had under consideration the Act of June 14, 1918 (40 Stat. 606). One section is that providing that the probate courts of the State of Oklahoma may determine heirs of any deceased allottee of the Five Civilized Tribes who might die leaving restricted heirs. The court said:

'It seems clear from the language of the Act of June 14, 1918, and its legislative history (S. Rep. No. 330, 65th Cong. 2d Sess.) that Congress vested in the Oklahoma state courts jurisdiction to determine heirship in these restricted lands (para. 1) and jurisdiction to partition them. See *Salmon* v. *Johnson,* 78 Okl. 182, 189 P. 537; *United States* v. *Bond,* 108 F. (2d) 504. The authority of Congress to select state tribunals to perform such functions is clear. *Parker* v. *Richard,* 250 U. S. 235; *Harris* v. *Bell,* 254 U. S. 103; *Stewart* v. *Keyes,* 295 U. S. 403. But a grant of jurisdiction to a particular court without more does not determine what parties are indispensable to the proceedings in question. *Petitioner concedes that the United States is not a necessary party to proceedings to determine heirship under para. 2 of the Act of June 14, 1918.* (Emphasis supplied.) Since restrictions on alienation do not prevent inheri-

tance, no governmental interest is at least directly involved in such a determination. It may likewise be inferred from the language, nature, and purpose of Acts of Congress which vest jurisdiction over specified Indian affairs in a designated court that Congress not only has made *that tribunal the exclusive agency to effectuate the Federal policy but also has dispensed with any requirement that the United States be a party to the proceedings.*' (Emphasis supplied.)

"The Act of 1926 provides for service of notice upon the United States in those actions wherein the United States is an indispensable party in order that the judgment rendered therein may be binding upon the United States Government. It seems to follow, as the night does the day, that the converse of that is true, to-wit if the United States Government is bound by the proceedings without being made a party, then the notice is not required to be served, and if served, it is inoperative to effect a removal or to give jurisdiction to the court to which the proceedings are transferred. From a practical standpoint there are many objections to the removal of such a proceedings, but while the practical objections should not out-weigh a clear mandate of an Act of Congress, such practical objections certainly are worthy of such consideration in determining whether or not Congress intended that which is now sought. For example, in this case the County Court has already appointed administrators. They have qualified under the law of Oklahoma. They are officers of the County Court of Okfuskee County, Oklahoma. If this court is to become a probate court and administer the unrestricted assets of Peter Micco, deceased, is it required to do so with administrators appointed by the state court? May this court discharge said administrators and appoint new ones, although the jurisdiction of the County Court to make the appointment is exclusive? *Merrell* v. *United States, supra.* If the discharged administrators should desire to appeal, to what court would they appeal? Would this court give notice to creditors, and if so, how? Would

this court be required to approve and disapprove claims after approval or disapproval by the administrator? In the progress of the administration in this court, what law would govern as to an appealable order, and in the event of an appeal what would become of the right of the appellant to a trial *de novo* which he has upon appeal from the County Courts to the District Courts of Oklahoma? The practical result of this removal is the same as if an injunction should issue by this court prohibiting the County Court from proceeding for the purpose of having this court rather than the County Court determine the question of fact of who are the heirs of Peter Micco, deceased. The reason for having that determination here rather than the County Court is difficult to divine. Some may conceive that it may be done better in the Federal Court. It might, or it might not. Federal Courts and state courts are supposed to work in comity, each respecting the field allocated to the other, under our system of government. A procedure which would oust the County Court of its jurisdiction in certain selected proceedings, unless clearly warranted under some Act of Congress, is a radical departure from that traditional concept of our government and should originate in Congress rather than in the courts.

"In the final analysis, all that is attempted here is to remove a probate proceedings from the County Court and thereby prohibit the County Court from proceeding further, and thereupon have this court exercise its traditional equity powers—not probate powers—in determining two things, to-wit: what property is restricted, and the fact of who are the heirs of the deceased. This court has at all times been available in an original action to determine these questions. Its jurisdiction in an original action is clear. Certainly its jurisdiction in a removed action is doubtful. In my judgment its lack of jurisdiction is clear.

"For the reasons stated herein, the complaint in intervention filed by the United States Government is dismissed, without prejudice to the filing of a complaint

herein seeking the same or similar relief. The complaint in intervention filed on behalf of Sherman Micco is dismissed. To which action of the court the Government and Sherman Micco except.

"The proceedings are remanded to the County Court of Okfuskee County, Oklahoma.

/s/ Eugene Rice,
United States District Judge."

The Act of May 27, 1908 (35 Stat. 312), substituting the County Courts of Oklahoma for the Secretary of the Interior as a federal agent to approve full-blood conveyances made no provision for a determination of heirship of deceased allottees. The courts were therefore without jurisdiction to enter a binding decree determining the heirs of deceased allottees in so far as their restricted lands were concerned. *Wolfe* v. *Gills*, 96 Okl. 6, 219 Pac. 350; *Cowokochee* v. *Chapman*, 90 Okl. 121, 215 Pac. 759, certiorari denied 263 U. S. 317. The functioning of the County Court in approving deeds was purely administrative. *Haddock* v. *Johnson*, 80 Okl. 250, 194 Pac. 1077; *Malone* v. *Wamsley*, 80 Okl. 181, 195 Pac. 484. The court was not bound by the probate rules promulgated by the Supreme Court. *Haddock* v. *Johnson, supra.* It was not necessary that the approval by the court be embodied in a formal order or journal entry. *Camel* v. *Dick*, 157 Pac. 1062. There was no appeal from the order of the County Court approving a deed. *Coachman* v. *Malone*, 185 Okl. 465.

The Act of January 27, 1933, amended the Act of May 27, 1908, and provided procedure to be followed in approval cases. The approval must be in open court, after notice in accordance with the rules of procedure in probate matters adopted by the Supreme Court of Oklahoma. It required the appearance of probate attorneys in approval matters and gave the right of appeal from the order of the County Court to the District Court. However, this act did not

change the status of the County Court, functioning as a federal agent, for this specific purpose, from an administrative to a judicial officer.

Section 1 of the Act of June 14, 1918, making the County Court a federal agent for the specific purpose of "determining the question of fact as to who were the heirs of full-blood Indians," specifically provided for the right of appeal from the action of the County Court. Evidently Congress had in mind the functions, already being performed by the County Courts, in approval of deeds and that the right of appeal did not exist unless specifically granted. In the case of *State* v. *Huser, supra,* the Oklahoma Supreme Court defined the functions of the County Court, operating under the Act of June 14, 1918, as follows:

> *"The words 'the question of fact' were employed by Congress to make clear its purpose that the agencies designated were to exercise administrative functions as distinguished from strictly judicial functions.*
>
> "We are of the opinion then that, when heirship of a deceased allottee leaving restricted Indian heirs is established as a question of fact by the County Courts as administrative agencies of the Federal Government under the procedure provided by the act such determination becomes conclusive evidence of that fact and bears the same relation to that issue, when the same arises in an action in the courts, as do the approved rolls as to quantum of blood and the enrollment records as to the age of a member of said tribes."

The above case has been consistently followed by the Oklahoma courts and Federal courts.[1]

The obvious purpose of Congress in the enactment of Section 1 of the Act of June 14, 1918, was to vest the courts

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1. For other cases supporting this same conclusion see: In re Fulsom Estate, 85 Pac. 13; State v. Wilcox, 182 Pac. 673; McDougal v. Black Panther Oil and Gas Company, 273 Fed. 113; Sturm v. Dyer, 113 P. (2d) 378; Owen v. Kitchen, 232 Pac. 797; Plummer v. Childers, et al., 224 Pac. 298.

of Oklahoma with jurisdiction to determine the heirship of full-blood allotees, in order that full-blood Indian heirs might convey a merchantable title to inherited lands and thus receive for them a sum commensurate of the value of said land. The act specifically provided that the action of the County Court decreeing the heirs of full-blood Indians *should be conclusive* of said question and both State and Federal Courts have so construed it. *State* v. *Huser*, 76 Okl. 130, 184 Pac. 113; *In re Fulsom Estate*, 141 Okl. 300, 285 Pac. 13; *Pitman* v. *Commissioner of Internal Revenue*, 64 F. (2d) 740; *Roberts* v. *Anderson*, 66 F. (2d) 874; *United State* v. *Hellard*, 88 L. ed. 929.

The 1926 Act was not passed as a removal statute. It was designed to stabilize titles in Eastern Oklahoma. The need for such legislation was contained in a report by the Committee of Indian Affairs, submitted by Mr. Hastings, Congressman from Oklahoma, a part of which is incorporated in Judge RICE's opinion. It will be noted that there is no mention made, in this report, of any defects in the probate procedure, nor that judgments of County Courts operating under Section 1 of the Act of 1918 were not conclusive. No court had ever held this procedure defective and no lawyer, so far as we know, had ever contended that the Government was a necessary party to a case in the County Court, the act had stood the test in both State and Federal Courts. *State* v. *Huser*, 76 Okl. 130, 184 Pac. 113; *In re Jessie's Heirs*, (1919) 259 Fed. 694; *McDougal* v. *Black Panther Oil and Gas Company*, (1921) 273 Fed. 113.

The County Courts had been operating under the 1918 Act for eight (8) years at the time the 1926 Act was before Congress. If the findings of the County Court operating under Section 1 of said act was not conclusive against the Government this fact would have been presented to the Congressional Committee by the Oklahoma lawyers who

were seeking relief for defective titles and would have been a part of its report. The legislative history of the Act of 1926, together with the descriptive words used in Section 3 of said act, conclusively show Congress did not have in mind Section 1 of the Act of 1918 when the 1926 Act was passed. Section 3 reads in part: "Any one or more of the parties to a *suit* in the United States Court of the State of Oklahoma or in the state courts of Oklahoma * * *." We submit that the word *suit* in its commonly accepted meaning refers to civil actions in the state courts and is not properly or usually applied to probate matters. The act in referring to *parties to the suit* does so by referring to them as "plaintiffs," "defendants" and "interveners." These nouns are used to designate parties in civil actions only and are unknown to probate practice in Oklahoma. Process, provided for under this section, is comparable to process in the civil courts. For instance, service of notice is to be made within ten (10) days, the usual time provided for in return of summons in the District and Superior Courts. The act further provides, "If return of service thereof be not made within the time allowed by law, for the return of service of summons, alias notice may be given. * * *" Summons in Oklahoma refers to process in the civil courts and is unknown to probate practice in this state. Twenty (20) days was allowed after the service of notice on the Superintendent of the Five Civilized Tribes to plead. This is the same time allowed defendants to plead or answer in civil actions hence the references to *suits*, *parties* and *process* in Section 3 of said act refer to actions in the civil courts and not probate proceedings.

County Courts Do Not Try Title of Land in Determining Heirs Under the 1918 Act.

The extent of the authority, or jurisdiction, conferred on the County Court by Section 1 of the 1918 Act was first

presented to the Oklahoma Supreme Court in the case of *Homer* v. *Lester*, 95 Okl. 284, 219 Pac. 392, certiorari denied 264 U. S. 580. The identical question presented in that case was whether or not a judgment of the County Court operating under the 1918 Act was conclusive against purchasers from heirs, or alleged heirs, who purchased prior to the passage of the act. The court in its opinion used the following language:

> "An examination of this Act of Congress fails to disclose any intention to confer upon the County Courts jurisdiction to try title of land, it being clearly the intent of the act to empower the County Courts, as an incident to the administration of an estate of a restricted Indian leaving restricted heirs, to determine the beneficiaries of the estate, that is, the heirs as between the petitioner for determination and all other persons claiming to be heirs."

The opinion in this case is lengthy. The court reviewed the history of Indian litigation in Oklahoma, citing numerous authorities of both State and Federal Courts, on the jurisdiction of the County Court operating under the 1918 Act to try title, under the restrictions of the Oklahoma Constitution, Art. 7, Sec. 12, which specifically denied such jurisdiction to County Courts. Concluding its opinion the court used the following language:

> "We therefore conclude that the Heirship Act of Congress does not undertake to confer any jurisdiction upon the County Courts to try title to land, and that the County Court's judgment rendered under the authority of that act is binding on all persons claiming to be heirs, and binding on all persons who purchased from alleged heirs after the institution of proceedings to determine heirship, but not binding on parties who purchased from alleged heirs prior to the passage of the act and at a time when the allotment was not subject to administration proceedings on behalf of creditors."

This same conclusion was reached by our Supreme Court in the cases of *Plummer* v. *Childers*, 224 Pac. 298; *In re Jefferson's Estate*, 221 Pac. 247, and *Sturm* v. *Dyer*, 113 P. (2d) 378; *Swirtz* v. *Dorl*, 253 Pac. 75-76.

The opinion in the above case was written by Judge KENNAMER, who was then a member of Oklahoma Supreme Court. Judge KENNAMER was later appointed Federal District Judge for the Northern District of Oklahoma and acting in that capacity wrote the opinion in *Anderson* v. *Peck*, 53 F. (2d) 257, referred to by the Government in its brief. In the above case Judge KENNAMER reaffirmed the rule of law announced in the *Homer* v. *Lester* case. We quote from the opinion:

> "A proceeding to determine heirship under the statutes above cited does not try and determine title; it merely establishes the fact as to the heirship. *Homer* v. *Lester*, 95 Okl. 284, 219 P. 392; *In re Jackson's Estate*, 117 Okl. 151, 245 P. 874. The Federal District Courts have jurisdiction to ascertain who are the restricted heirs of restricted full-blood Indians, and the Act of Congress of June 14, 1918, *supra*, did not repeal or terminate that jurisdiction. The above Act of Congress vested concurrent jurisdiction in the probate courts of Oklahoma with the jurisdiction vested in the Federal District Courts for such determination. *McDougal* v. *Black Panther Oil & Gas Co.*, (C. C. A.) 273 F. 113."

The case of *Caesar* v. *Burgess*, 103 F. (2d) 503, originated in the County Court of Seminole County, Oklahoma. It involved the contest of a will. The case was removed to the Federal Court of the Eastern District of Oklahoma under the 1926 Act. The question of jurisdiction of the court in the removed case was first raised in the Circuit Court. In its opinion by Judge BRATTON the court held, as a basis for its opinion on the jurisdictional question, that an interest in land is determined in such a proceeding by saying

"The effect of a valid will operates as an alienation of property."

The court in its opinion failed to distinguish between *'a valid executed will'* and a *'will validly passing title.'* The first question *'valid execution'* must be determined by the County Court when the will is admitted to probate. The second question, *'valid alienation'* cannot be determined by the County Courts in Oklahoma.

This status is firmly fixed in our law and decisions. It is illustrated by the cases which hold that although a will may be admitted to probate as validly executed, that judgment does not establish the will as a valid alienation. *Phillips* v. *Smith*, 186 Okl. 636, 100 P. (2d) 294; *Coats* v. *Riley*, 154 Okl. 291, 7 P. (2d) 644; *Matz* v. *Gill*, 147 Okl. 199, 286 Pac. 441; *Armstrong* v. *Letty*, 85 Okl. 205, 209 Pac. 168; *Hale* v. *Buckholtz*, 75 Okl. 196, 183 Pac. 42; *Letts* v. *Letts*, 73 Okl. 313, 176 Pac. 234. Both *Armstrong* v. *Letty* and *Coats* v. *Riley* are cited by the Circuit Court in *Caesar* v. *Burgess* on the point that requirements of the Act of April 26, 1906, as amended by the Act of May 27, 1908, are no part of the due execution and attestation of wills (pages 508-509), but the Oklahoma Supreme Court held further in these decisions that since the requirement of the Federal Act affected the validity of the will as an instrument passing title (as alienation), the County Court had no power to determine whether that had been performed. This conclusion of the Oklahoma Court was not referred to in the decision of the Circuit Court. If it is given effect, it destroys the basis of that decision.

The holding in the *Peter Micco* case conforms to the decisions of this court. *United States* v. *Bowling*, 256 U. S. 484, 65 L. ed. 1054; *United States* v. *Hellard*, 88 L. ed. 929. In the *Bowling* case this court held that an order made by the Secretary of the Interior, acting under the authority of

the Act of June 25, 1910 (26 Stat. at L. 855), decreeing the heirs of restricted Indians, was valid and conclusive. The act above referred to after granting authority to make such a finding, specifically provided the "findings of the Secretary of the Interior should be final and conclusive of said question."

It is interesting to note that the language used in the above act, giving the Secretary of the Interior authority to determine heirs of restricted Indians in a certain class, is similar to the language used in Section 1 of the 1918 Act making the County Courts of Oklahoma federal agents to determine the question of fact as to the heirs of deceased restricted Indians. Referring to the effect of the County Court's findings, the 1918 Act specifically states that said findings *shall be conclusive of said question.* Apparently Congress conferred on the County Courts of Oklahoma the same authority to determine the question of fact as to who are the heirs of restricted Indians of the Five Civilized Tribes, it had previously given the Secretary of the Interior in the Act of June 25, 1910. We seriously doubt that counsel will contend that the Government was a necessary party to a valid decree made by the Secretary of the Interior.

In the brief filed by the Government in the case of *United States* v. *Hellard,* 88 L. ed. 929, it was conceded that the Government was not a necessary party in an action to decree heirs by the County Court. We quote from their brief:

> "The United States is not a necessary party to proceedings to determine heirship because the only interests directly involved in such proceedings are those of heirs. No governmental interest of the United States is directly involved, inasmuch as the restrictions on alienation do not prevent inheritance. Cf. *Hy-yu-tse-mil-kin* v. *Smith,* 194 U. S. 401, 413-414. Moreover, the determination of heirship does not directly affect the

restrictions on the land or the land itself. The restricted property of the deceased Indian is not within the jurisdiction of the probate courts and is not subject to administration by those courts. *Cowokochee* v. *Chapman*, 90 Okl. 121, 124, 215 Pac. 759 (1922), certiorari denied 263 U. S. 713; *March* v. *Peter*, 179 Okl. 207, 212-213, 64 P. (2d) 912 (1936). By nature a proceeding to determine heirs is such that a probate court may render a valid judgment even though it does not have before it all possible claimants to heirship."

For the rule announced by this court in the above case we quote from the opinion:

"Petitioner concedes that the United States is not a necessary party to proceedings to determine heirship under Sec. 1 of the Act of June 14, 1918. Since restrictions on alienation do not prevent inheritance, no governmental interest is at least directly involved in such a determination. It may likewise be inferred from the language, nature and purpose of Acts of Congress which vest jurisdiction over specified Indian affairs in a designated court that Congress not only has made that tribunal the exclusive agency to effectuate the federal policy but also has dispensed with any requirement that the United States be a party to the proceedings. See *Hy-Yu-Tse-Mil-Kin* v. *Smith*, 194 U. S. 401, 413, 414, 48 L. ed. 1039, 1045, 1046, 24 S. Ct. 676; *Winton* v. *Amos*, 225 U. S. 373, 392, 65 L. ed. 684, 694, 41 S. Ct. 342."

No governmental interest being involved in a proceeding under Section 1 of the Act of 1918, the Government not being a necessary party to such a proceeding for a final and conclusive determination of the issues notice under Section 3 of the Act of 1926 was not authorized. The cause was improperly removed from the County Court of Okfuskee County to the Federal District Court of the Eastern District of Oklahoma and was therefore properly remanded back to said County Court.

To follow the procedure in the *Barnett* case by remanding the probate proceedings to the County Court with the Federal Court retaining jurisdiction to decree the heirs of Peter Micco, deceased, will leave unsettled and unexplored the question and extent of functional jurisdiction remaining in the County Court in the cause so remanded. With such a state of affairs could the County Court decree the heirs and distribute the unrestricted estate? Could it partition the lands belonging to the estate as was done in *United States* v. *Bonds*, 108 F. (2d) 504? In other words, can the Federal Court in such a proceeding deprive the County Court of the concurrent jurisdiction lodged in that court under the 1918 Act and as recognized and affirmed in the holdings of the courts in the cases of *State* v. *Wilcox*, 75 Okl. 158, 182 Pac. 673; *March* v. *Peter*, 179 Okl. 207, 62 P. (2d) 915; *McDougal* v. *Black Panther Oil & Gas Company*, 273 Fed. 113; *Roberts* v. *Anderson*, 66 F. (2d) 874; *Wells* v. *Helms*, 105 F. (2d) 402. Such a holding will be equivalent to the clothing the Federal Courts with power to enjoin the County Courts from exercising their prerogative as a federal agent possessing concurrent jurisdiction with the Federal Courts, which under the law cannot be done. To so hold will enable the Federal Courts to do indirectly that which they are prohibited by law from doing directly.

It is interesting to note that in *United States* v. *Anglin & Stevenson*, *supra*, the Government contended that under Section 1 of the Act of 1918, the probate courts of Oklahoma acquired jurisdiction to determine only the fact of who were the heirs of restricted Indians, the case *(Jackson Barnett)* having been originally filed in the probate court of Muskogee County and removed to the Federal Court; that the Federal Court derived no greater jurisdiction than that which was conferred upon the County Court, and that it had no equity jurisdiction and for that reason could not

allow attorneys' fees out of restricted funds belonging to the estate. In the opinion the court referred to the fact that the two suits commenced in District Courts of Muskogee and McIntosh Counties were, in equity, to quiet title to real estate located in the respective counties which belonged to the estate; in each case the general equity powers of the court were invoked for the purpose of equitable relief. These cases were removed to the Federal Court and consolidated with the heirship proceedings and in deciding the jurisdictional question the court used the following language:

> "In any event, it is clear that the trial court possessed all of the equity jurisdiction which existed in the *state district courts*, from which the cases were removed."

It will be noted that the court did not base its judgment on jurisdiction obtained in the removed probate case, but on the jurisdiction in the removed equity cases.

In this same opinion the Circuit Court recognized the concurrent jurisdiction of the County Court operating under Section 1 of the Act of 1918, with the jurisdiction of the State and Federal Courts, and we quote from the opinion:

> "Ordinarily, the jurisdiction of the Federal Court on removal under the General Removal Act, Section 28 of the Judicial Code, as amended, 28 U. S. C. A., Sec. 71, is measured by the jurisdiction of the court from which the case was removed. *Booth* v. *Merchants National Bank*, 5 Cir., 100 F. (2d) 478. But the jurisdiction to determine heirship of a deceased Indian citizen conferred upon the County Court of Muskogee County by Section 1 of the Act of 1918, is not exclusive. State and Federal District Courts are also authorized to determine heirship of a restricted Indian citizen of the Five Civilized Tribes concurrently with the probate court as a necessary incident to the exercise of their original and general jurisdiction. *State* v. *Huser*, 76 Okl. 130,

183 P. 113, 122; *State* v. *Wilcox*, 75 Okl. 158, 182 P. 673; *March* v. *Peter*, 179 Okl. 207, 64 P. (2d) 912; *McDougal* v. *Black Panther Oil & Gas*, 8 Cir., 273 F. 113; *Roberts* v. *Anderson*, 10 Cir., 66 F. (2d) 874; *Anderson* v. *Peck*, D. C., 53 F. (2d) 257; *Homer* v. *Lester*, 95 Okl. 284, 219 P. 392."

The Government in its brief asserts "that the decision in the *Peter Micco* case is a departure from the established law and creates doubt as to the validity of the numerous titles and property rights." So far as we have been able to establish from cases that have proceeded to judgment, very few probate cases have been removed to the Federal Court. "*In re Jessie's Heirs*," 259 Fed. 694, was the first case removed after the passage of the Act of June 14, 1918. This was not an ordinary administration case, but was a special proceeding filed in the County Court of Okfuskee County to determine the heirs of Harper Jessie, deceased full-blood member of the Creek Tribe of Indians, under the provision of the Act of June 14, 1918. In an able and well considered opinion, Judge WILLIAMS, Federal District Judge, sustained the motion to remand the case to the County Court. Referring to the 1918 Act, the court used the following language:

> "The Act of June 14, 1918, applying only to restricted lands and to full-blood members of such existing tribes, was a valid exercise of legislative power by Congress. In conferring this authority upon the County Courts of the state, it is presumed that Congress considered the provisions of the State Constitution. The County Court in such capacity is, in effect, a federal agency, acting with the same result as if it was done by the Superintendent of the Five Civilized Tribes, the Commissioner of the Land Office, or the Secretary of the Interior. *Barnett* v. *Kunkel, supra; Marcy* v. *Board of Commissioners*, 45 Okl. 1, 144 Pac. 611. The Seventh Legislature in passing the Act of April 4, 1919, (Chapter 25, Session Laws Okla. 1919) obviously had in mind the Act of Congress of June 14, 1918."

The court further held:

> "The county or probate courts of this state may not exercise a jurisdiction conferred under the Act of Congress June 14, 1918, if, in so doing, it would contravene Section 12 of Article 7 of the Constitution of Oklahoma."

The court concluded the 1918 Act did not violate Section 12, Article 7 of the Constitution of Oklahoma as it did not attempt to give County Courts jurisdiction to try title to land. Title not being involved, no federal question was presented, therefore, the case was improperly removed.

The next administration case was the *Jackson Barnett* case, 4556 Equity, U. S. D. C., Judge WILLIAMS in an unreported opinion referred to by the Government in its brief, remanded the administration proceedings but retained jurisdiction to decree heirs, the case being consolidated with equity cases transferred from District Courts from McIntosh and Muskogee Counties. In his opinion, Judge WILLIAMS refers to his holdings in the *In re Jessie's Heirs*, 259 Fed. 694, and explains the reversal of his previous decision in the *Jessie's Heirs* case as follows:

> "*In re Jessie's Heirs*, 259 Fed. 694, was when the county judge was acting as a federal agent and not as a court and prior to the Act of April 12, 1926."

We submit that there is nothing in the Act of April 12, 1926, that changed the authority or jurisdiction of the County Courts operating under Section 1 of the Act of June 4, 1918. It cannot be said that these two conflicting opinions establish a precedent.

The next case to proceed to an opinion was the case of *In re Palmer's Will*, 11 Fed. Supp. 307. The opinion by Judge WILLIAMS, District Judge, involved the will of a full-blood Indian. The will was admitted to probate by the County Court of Coal County. The case was appealed to

the District Court; thereafter notice was served in pursuance to Section 3 of the Act of 1926 and the case was removed to the Federal Court. Referring to the effect of the removal, Judge WILLIAMS in his opinion, 306, used the following language:

> "The removal of this case does not bring here the entire settlement of the estate or have the effect of taking away from the state probate court settlement of the estate, except as to the validity of the execution of a will by a restricted member of the Five Civilized Tribes alienating restricted Indian allotment, or restricted Indian lands, and restricted rents, incomes, issues, proceeds and profits derived therefrom, the parties thereto interested therein being members of the tribe. It will be presumed that the state probate courts will respect the adjudication which may be made here as to such matters. *Watterman* v. *Canal Louisiana Bank Company*, 64 L. ed. 80."

If Congress had in mind the removal of that part of a probate case referred to by Judge WILLIAMS, in the opinion of the above case, we think they would have made provisions for such a procedure. On the contrary the act provides that when notice is served, under the provisions of the act, the state court shall "accept such petition and proceed no further in said suit." In referring to the jurisdiction of the Federal District Court in the removed action the act provides "the cause shall then proceed in the same manner as if it had been originally commenced in said District Court." This indicates the transfer of all the issues involved in the suit, transferable under the act, and not just a part of them. If all the issues involved in the suit were not transferable under Section 3 of the act, we submit that no part of the suit is transferable.

The next case was the case of *Caesar* v. *Burgess*, 103 F. (2d) at page 934, heretofore referred to in this brief.

Following the case of *Caesar* v. *Burgess*, this court in the case of *United States* v. *Hellard*, 322 U. S. 363, for the first time passed on this question and held the Government was not a necessary party in a suit to decree heirs by the County Court under Section 1, 1918 Act.

We agree with the Government that there are hundreds of titles involved in the outcome of this case. County Courts have been decreeing heirs under the 1918 Act for now almost twenty-eight (28) years. The 1918 Act had been in force eight (8) years at the time the 1926 Act was passed. No notices were served during this eight (8) years although hundreds of cases were decided by the County Courts during that time. Since the passage of the 1926 Act very few notices have been served in County Court cases, it being the general opinion of the lawyers that such notice was not necessary in probate cases. To hold the Government a necessary party and the service of notice on the Superintendent under the provisions of Section 3 of the 1926 Act essential to the finality of the County Court's decrees, would place in doubt hundreds of titles. The holding in the *Peter Micco* case definitely settles the title of all those cases where notice was not served upon the Superintendent as required by Section 3 of the 1926 Act and certainly it would not place a cloud upon any title where such a notice was served.

The conclusions of the court in the *State ex rel.*, v. *Huser*, 76 Okl. 130, 184 Pac. 143, and of *McDougal* v. *Black Panther Oil & Gas Company*, 273 Fed. 113, and many other cases referred to herein have been impliedly written into hundreds of land titles on the eastern side of Oklahoma and the results of these decisions should not be disregarded. *McDougal* v. *McKay*, 237 U. S. 372, 59 L. ed. 1001.

Conclusions.

We submit that the order entered on March 6, 1945, remanding the *Peter Micco* case to the County Court of Okfuskee County, Oklahoma, is not an appealable order nor is said order reviewable by mandamus and said application for mandamus should be denied.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES.

No. 411.—October Term, 1945.

The United States of America, *vs.* Judge Eugene Rice, District Judge for the Eastern District of Oklahoma.	On Certificate from the United States Circuit Court of Appeals for the Tenth Circuit.

[April 22, 1946.]

Mr. Chief Justice Stone delivered the opinion of the Court.

In this case the Court of Appeals for the Tenth Circuit, acting under § 239 of the Judicial Code, 28 U. S. C. § 346, has certified a question of law upon which it desires the instruction of this Court for the proper decision of the cause. The question is whether that court may, by mandamus, review the judgment of the District Court for Eastern Oklahoma ordering the remand of a proceeding to the County Court of Okfuskee County, Oklahoma, from which it had been previously removed to the district court pursuant to § 3 of the Act of April 12, 1926, c. 115, 44 Stat. 239.

The certificate shows that proceedings were begun in the county court by a petition for administration on the estate of Peter Micco, a restricted Indian member of the Five Civilized Tribes in Oklahoma. The county court granted the petition, and appointed administrators. Section 3 of the Act of April 12, 1926, provides that a party to a suit "in the state courts of Oklahoma to which a restricted member of the Five Civilized Tribes in Oklahoma, or the restricted heirs or grantees of such Indian are parties, . . . and claiming or entitled to claim title to or an interest in lands allotted to a citizen of the Five Civilized Tribes or the proceeds, issues, rents, and profits derived from the same, may serve written notice of the pendency of such suit upon the Superintendent for the Five Civilized Tribes." The United States is afforded a specified time after notice is given to appear in the suit, and after such appearance, or the expiration of the time specified, it is provided that "the proceedings and judgment in said cause shall bind the United States and the parties thereto to the same extent as though

no Indian land or question were involved." The Act further provides that

> "the United States may be, and hereby is, given the right to remove any such suit pending in a State court to the United States district court by filing in such suit in the State court a petition for the removal of such suit into the said United States district court, to be held in the district where such suit is pending, together with the certified copy of the pleadings in such suit. . . . It shall then be the duty of the State court to accept such petition and proceed no further in said suit. . . . The said copy shall be entered in the district court of the United States . . . and the defendants and intervenors in said suit shall within twenty days thereafter plead, answer, or demur to the declaration or complaint in said cause, and the cause shall then proceed in the same manner as if it had been originally commenced in said district court, and such court is hereby given jurisdiction to hear and determine said suit, and its judgment may be reviewed by certiorari, appeal, or writ of error in like manner as if the suit had been originally brought in said district court."

Following the service upon the Superintendent of the Five Civilized Tribes of notice of the pendency of the suit in the county court, the United States timely filed its petition in that court for an order of removal, alleging that the proceeding was instituted to obtain the appointment of an administrator for the estate of a three-fourths blood Seminole Indian; that a portion of said estate, comprising real and personal property is restricted under the laws of the United States; that title to and interests in restricted land are involved; that the heirs at law of Micco are restricted Indians and wards of the United States.

Thereupon the county court made its order of removal, and a transcript of the proceedings was filed in the district court. The United States then filed its complaint in intervention in the district court, praying a determination of the heirs of Peter Micco, and of the specific parts of decedent's property which are restricted and subject to the supervision of the Secretary of the Interior. On motion of the administrators appointed by the county court, the district court entered an order dismissing the complaint in intervention without prejudice, and remanding the proceeding to the county court for want of jurisdiction in the district court. *In re Micco's Estate*, 59 F. Supp. 434. The United States thereupon instituted this proceeding in the circuit

court of appeals by a petition for writ of mandamus, to direct the district court to vacate its judgment dismissing the Government's petition for intervention and remanding the proceeding.

The certificate of the circuit court of appeals, after stating that the court is equally divided on two questions, first, whether the judgment of remand is reviewable by mandamus, and, second, whether the proceeding was removable under the provisions of the Act of 1926, certified a single question for our consideration, as follows: "May this court, by mandamus, review the judgment of the United States district court for the eastern district of Oklahoma, ordering the remand of the proceeding to the county court of Okfuskee County, Oklahoma?" The certificate further requested this Court to exercise is authority under § 239 of the Judicial Code, "to require the entire record in the cause to be sent up for its consideration and to decide the whole matter in controversy." The Government has made a motion to like effect.

In considering these requests, it is to be noted that the only matter pending in the court below to which the certified question relates is the application filed in that court for mandamus, on which the court has not acted. There is consequently no order or judgment in the case which can be brought before this Court by appeal. The practice established by statute, 28 U. S. C. § 436, of answering questions certified to this court, or in some such cases, of deciding the entire controversy on the whole record, is plainly not within our original jurisdiction. As far as it is within our appellate jurisdiction, our authority is defined wholly by the statute, which provides that upon the presentation of the certificate, this Court "may require that the entire record in the cause be sent up for its consideration and thereupon shall decide the whole matter in controversy in the same manner as if it had been brought [here] by writ of error or appeal." But the only manner in which we, as an appellate court, can decide a controversy brought here by writ of error or appeal is by affirming, reversing or modifying the order or judgment before us for review. It may be doubted whether the statute contemplates our going beyond the certified question, to decide a case or controversy not within our original jurisdiction, and which, since no inferior court has decided it, could not be brought here on appeal. But we need not resolve the doubt as to our power here, for as will presently appear, the answer which we give to the

question certified is dispositive of the whole case before the Circuit Court of Appeals, making it unnecessary to express an opinion on any other issue which the record might present, or to order the record to be filed here.

The Act of 1926, under which the cause, *In re Micco's Estate*, was removed from the Oklahoma county court, contains no provisions respecting remand or any mode of review of an order of remand. But its provisions must be read with those provisions governing removal of suits from state courts to federal district courts, and their remand, appearing in § 2 of the Judiciary Act of March 3, 1887 (24 Stat. 552, reenacted to correct errors in enrollment, August 13, 1888, 25 Stat. 433, and again reenacted and amended March 3, 1911, 36 Stat. 1094, as § 28 of the Judicial Code, 28 U. S. C. § 71), and in § 37 of the Judicial Code, 28 U. S. C. § 80. Section 80 authorizes remand of "any suit" removed from a state court to a district court where the latter finds that it is without jurisdiction. Section 2 of the Act of 1887, provided for the removal of diversity suits from state courts to federal circuit courts, now district courts, and, as corrected in 1888, contained a separate paragraph, in terms relating to "any cause" removed from a state court into a circuit court. This paragraph read:

> "Whenever any cause shall be removed from any State court into any circuit court of the United States, and the circuit court shall decide that the cause was improperly removed, and order the same to be remanded to the State court from when it came, such remand shall be immediately carried into execution and no appeal or writ of error from the decision of the circuit court so remanding such cause shall be allowed."

Before the Judiciary Act of March 3, 1875, 18 Stat. 470, 472, an order of remand was deemed to be not reviewable by appeal or writ of error because the order was not final. *Railroad Company* v. *Wiswall*, 23 Wall. 507; *In re Pennsylvania Company*, 137 U. S. 451. But § 5 of the Act of 1875 expressly authorized the review of an order of remand by appeal or writ of error "in any suit" removed from a state court. This provision was repealed by § 6 of the Act of 1887, *supra*, and to make doubly certain, § 2, *supra*, specifically prohibited appeals, with the added direction that the order of remand should "be immediately carried into execution." It thus appears that when the Act of 1926 was passed, the prac-

tice in removal cases was, as it had been established from the beginning, save for a brief interval under § 5 of the Act of 1875, that an order of remand was not appealable, and it is also clear that in 1926, as for forty years before, § 2 of the Act of 1887 required the remand of "any" removed cause to "be immediately carried into execution".

The enactment of § 3 of the 1926 Act, without more, did not confer upon the Government any right of appeal from an order remanding a cause removed under that Act. We cannot say that under the Act of 1926, standing alone, the right of appeal from an order of remand stands on any different footing than it did under any other statute authorizing removal before the enactment of the 1875 Act, or that the order of remand is any less final in the case of the Government than in the case of an individual. Each loses, by the order, such right as there may be to litigate the case in the federal courts on removal, but both retain such rights as they may have to continue the litigation in the state court or to bring an independent suit in the federal courts. To whatever extent the Government may be excluded from the operation of a statute in which it is not named, cf. *United States* v. *Stevenson*, 215 U. S. 190, 197 with *United States* v. *California*, 297 U. S. 175, 186, it is clear that the United States can not assert, by virtue of its sovereignty, a right of appeal which no statute has conferred, or which, if conferred, has been abolished. Not only was no such right of appeal conferred by the Act of 1926, but, we think, as will presently appear, that the provisions of § 2 of the Act of 1887 denying an appeal from an order remanding a case removed under the Act of 1926, denied the right to review by mandamus as well.

Before the enactment of the Act of 1875 it had been suggested that although orders of remand were not appealable, because non-final, they might be reviewed by mandamus. *Railroad Co.* v. *Wiswall*, 23 Wall. 507; see also *In re Pennsylvania Co.*, 137 U. S. 451, 453; *Employers Corp.* v. *Bryant*, 299 U. S. 374, 378. After the right of appeal from such an order was conferred in all removal cases by § 5 of the Act of 1875, the question arose whether there could be review by mandamus of an order denying a motion to remand. This was answered in the negative on the ground that the right to appeal given by the 1875 Act was limited to orders of remand. Hence resort could not be had to mandamus to per-

form the office of a writ of error which Congress had withheld in the case of an order denying remand. *Ex parte Hoard*, 10[illegible] U. S. 578; *Ex parte Harding*, 219 U. S. 364; *Ex parte Roe*, 234 U. S. 70. In all these cases it was pointed out that the mode of review of an order denying remand is by appeal from the final judgment in the suit in which the remand is denied.

But it is urged that the mere failure of the 1926 Act to confer on the Government a right of appeal from an order of remand should not preclude review by mandamus, since, unlike the case where the district court refuses to remand, an order denying the right to have the removed cause tried in the district court could not otherwise be reviewed in the federal courts. But this argument presupposes that the provisions of the 1887 Act, prohibiting appeals from orders of remand, and directing the immediate execution of such order, do not apply to causes removed from the state courts under the Act of 1926, a supposition which disregards the plain purport of the words of the 1887 statute, and its legislative history.

Section 5 of the Judiciary Act of 1875, which, for the first time, authorized review of an order of remand by writ of error or appeal, was, by its terms, made applicable generally to "any suit" removed from a state court to a federal circuit (now district) court. It authorized the circuit court to remand the cause for want of jurisdiction, and provided that the order of remand should be reviewable by appeal. This section was repealed by § 6 of the 1887 Act, and § 2 of that Act substituted for the repealed provision governing appeals, a new provision, which was in terms likewise extended to orders of remand "whenever any cause shall be removed from any State court". Section 6, together with this substituted provision, explicitly withdrew the right of appeal and writ of error in all cases in which it had been previously allowed by Section 5, that is, in all cases removed from state courts under any statute authorizing removal. See *Employers Corp.* v. *Bryant*, *supra*, 380-1.

Section 2 of the Act of 1887 thus expressly denied review by appeal or writ of error from orders of remand which had previously been allowed by § 5 of the Act of 1875 in all cases removed from state courts, but which before that Act had been deemed not to be appealable because not final orders. But § 2 also coupled with this prohibition the direction, made applicable in every case

removed from a state court, that "such remand shall be immediately carried into execution". Reading and construing these provisions together, this Court has consistently held, and it is no longer open to doubt, that an order remanding a cause which is subject to the prohibition against appeals of § 2 cannot be reviewed by mandamus. *In re Pennsylvania Co., supra, Employers Corp.* v. *Bryant, supra.*

Congress, by the adoption of these provisions, as thus construed, established the policy of not permitting interruption of the litigation of the merits of a removed cause by prolonged litigation of questions of jurisdiction of the district court to which the cause is removed. This was accomplished by denying any form of review of an order of remand, and, before final judgment, of an order denying remand. In the former case, Congress has directed that upon the remand the litigation should proceed in the state court from which the cause was removed. It may be arguable, as a matter of policy, that in giving the Government the right to intervene and remove a cause from a state court, it should also have been given the right, not allowed to private litigants, to have orders of remand reviewed in the appellate courts. But the Congressional policy of avoiding interruption of the litigation of the merits of removed causes, properly begun in state courts, is as pertinent to those removed by the United States as by any other suitor, see *United States* v. *California, supra*, 186, and we think it plain that the Act of 1926 did not confer any such right of review, and that the Act of 1887 intended to withhold it in all cases of removal from state courts.

As we have already indicated, and as the legislative history shows, these provisions of the Act of 1887 were intended to be applicable not only to remand orders made in suits removed under the Act of 1887, but to orders of remand made in cases removed under any other statutes, as well. *Cole* v. *Garland*, 107 Fed. 759, dismissed on appeal 183 U. S. 693, approved in *Gay* v. *Ruff*, 292 U. S. 25, 29, n. 5; see also *Employers Corp.* v. *Bryant, supra*, 380-1. It was so held with respect to the Act of 1926 in *United States* v. *Fixico*, 115 F. 2d 389.

Nothing in the Act of 1926 purports to impair or restrict the application of § 2 of the 1887 Act, thus construed, to orders of remand made under 28 U. S. C., § 80, in cases removed under the 1926 Act. Congress, in enacting the 1926 Act, not only

failed to include in it any provision modifying what had been for forty years the established practice of denying review of orders remanding causes removed from state courts, but it must be taken to have been aware of the universality of that practice, and to have been content that, as established by the 1887 Act, it should apply to cases removed under the 1926 Act. Statutory language and objective, thus appearing with reasonable clarity, are not to be overcome by resort to a mechanical rule of construction, whose function is not to create doubts, but to resolve them when the real issue or statutory purpose is otherwise obscure. *United States* v. *California*, *supra*, 186.

The certified question will be answered "No", and the Government's motion that we order up the entire record may accordingly be denied.

So ordered.

Mr. Justice JACKSON took no part in the consideration or decision of this case.

SUPREME COURT OF THE UNITED STATES.

No. 411.—October Term, 1945.

The United States of America, *vs.* Judge Eugene Rice, District Judge for the Eastern District of Oklahoma.	On Certificate from the United States Circuit Court of Appeals for the Tenth Circuit.

[April 22, 1946.]

Mr. Justice Douglas, with whom Mr. Justice Black and Mr. Justice Rutledge concur, dissenting.

The Act of April 10, 1926, 44 Stat. 239, has two main purposes. It provides the machinery for bringing in the United States where the property interests of a restricted Indian of the Five Civilized Tribes are being litigated in either the federal or the state courts. This was done so that all interested parties might be concluded by one proceeding and titles to these Indian lands stabilized.[1] H. Rep. No. 222, 69th Cong., 1st Sess., p. 2. In case the proceeding is brought in a state court, the United States is given "the right to remove" the suit to the federal court by filing in the state court a petition for removal. The Act provides that when such petition is filed it shall be "the duty of the State court to accept such petition and proceed no further in said suit." The right to remove is unqualified. It rests in the sole discretion of the United States, which is given the choice of the forum. As stated in the House Report, *supra*, p. 2:

> "Section 3 provides only where the interest of a restricted Indian of the Five Civilized Tribes is being litigated in the State courts that service may be had upon the Government, and the Government is given the right to chose the forum in which the suit may be tried and may transfer such case to the United States district court upon motion in the event that the Government chooses to do so."

[1] Prior to the 1926 Act the United States could not be bound by a proceeding affecting restricted Indian lands. After the matter had been litigated, the United States could still institute an independent suit and annul the prior decree entered in the suit to which it was not a party. Sunderland v. United States, 266 U. S. 226.

But it is said that this special Act, passed in 1926, is governed by the general removal Act of March 3, 1887, 24 Stat. 552, Judicial Code § 28, 28 U. S. C. § 71, which disallows appeals from orders remanding causes removed from state courts. I do not agree.

(1) The 1926 Act contains none of the qualifications written into the general removal acts.

(2) The 1926 Act is an independent statute dealing with a highly specialized problem and limited as to parties and subject matter. The mischief at which the general removal acts were aimed is not present here. They were concerned with eliminating litigious interruptions of private litigation by prolonged disputes over the jurisdiction of the court to which the cause was removed. But the United States is not in a position of a private litigant. The United States has a special function to perform in these Indian cases. It represents the public interest. *Heckman* v. *United States*, 224 U. S. 413, 437-444. It alone is given the "right to remove". If the cause is remanded, it alone can seek review. It should be remembered that the 1926 Act provides a procedure whereby the United States can be bound by a suit instituted by another. It is fair to infer that when the United States was subjected to that risk, Congress intended that it should have a right, if it so elected, to have the cause heard and determined by its own courts. The "right to chose the forum in which the suit may be tried" (H. Rep., *supra*) can hardly have any other meaning.

(3) The 1887 Act in its operation was not applicable to the United States. It provided for removal by defendants. They alone could remove. The right of removal was therefore not available to the United States. It could not be a defendant in a state court, since it had not consented to be sued there. That was well settled at the time. For in 1896 the Court stated, "The United States, by various acts of Congress, have consented to be sued in their own courts in certain classes of cases; but they have never consented to be sued in the courts of a State in any case." *Stanley* v. *Schwalby*, 162 U. S. 255, 270. It seems clear then that the prohibition against review of orders of remand contained in the 1887 Act was not aimed at the United States. I think, therefore, that it should require an explicit provision in the 1926

Act to conclude that the United States was now to be bound by an Act heretofore inapplicable to it. It has long been held that if the United States is to be deprived of a right or a remedy by the general terms of a statute, "the language must be clear and specific to that effect." *United States* v. *Stevenson*, 215 U. S. 190, 197; *United States* v. *American Bell Tel. Co.*, 159 U. S. 548, 554; *United States* v. *Herron*, 20 Wall. 251, 263; *Dollar Savings Bank* v. *United States*, 19 Wall. 227, 239. This seems to me to be a clear case for the application of that rule.

If Congress had said that orders of remand under the 1926 Act should not be reviewed, mandamus of course would not lie. But since there is no such prohibition, mandamus is available to compel the District Court to perform its duty. *Railroad Co.* v. *Wiswall*, 23 Wall. 507; *In re Pennsylvania Co.*, 137 U. S. 451, 453.